Supreme Court, U.S.
FILED

961609 MAR 4 1997

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR A. LABOUR,

Petitioner,

vs.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THEODORE S. WENTWORTH
Counsel of Record

JAMES D. WHITE
ROBERT S. LEWIN
Attorneys at Law

500 Newport Center Drive, Suite 740
Newport Beach, California 92660
(714) 497-3102

Attorneys for Petitioner
ARTHUR A. LABOUR

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

28 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in upholding the District Court's decision to grant summary judgment in favor of two insurance carriers and against an insured, in an environmental clean up coverage dispute over who should pay for mandated clean up costs for subsurface soil contamination arising from the conduct of a metals plating business which involved long term splashing and dripping of toxic chemicals, but where the evidence also showed that some of the pollution damage resulted from three large, sudden and accidental spills which would otherwise have been covered by the insurance?

2. Whether the Court of Appeals erred when it failed to follow the requirements of the United States Supreme Court set forth in United States v. Diebold, Inc., 369 US 654, 8 L.Ed.2d 176, 82 S.Ct. 993 (1962) which requires that, at summary judgment, lower courts must give the non-moving party the benefit of all reasonable and logical inferences from the facts adduced?

3. Whether the Court of Appeals erred when it failed to follow the established and applicable California decisional law of Montrose v. Superior Court, 6 Cal.4th 287 (1993) and Vann v. The Travelers Companies, 39 Cal. App. 4th 1610 (1995) which require that under California law, summary judgment must be denied unless the insurer can establish *the absence of any potential* for coverage?

LIST OF ALL PARTIES

All of the parties are listed in the case caption except Dale Carter, Alice Kazanjian, Richard Perry, Arlene Perry, Sacramento Plating Company and RAR Marketing. Richard Perry, Arlene Perry, Sacramento Plating Company and RAR Marketing filed bankruptcy during the pendency of the district court case, did not oppose the summary judgment motion, and did not appeal from the district court's decision granting summary judgment, although they were also insured by the same insurance carriers under separate but identical policies of insurance. Only Labour filed an opposition to the summary judgment motion. Copies of this Petition are being served on all parties and counsel, including counsel for Insurance Environmental Litigation Association, a trade association of property and casualty insures, *Amicus*, below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	*i*
LIST OF ALL PARTIES	*ii*
TABLE OF CONTENTS	*iii*
TABLE OF AUTHORITIES	*iv*
OPINIONS BELOW	2
BASIS FOR JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	13
APPENDIX A	A-1

TABLE OF AUTHORITIES

Cases	Page
Cameron v. Vancouver Plywood Corp., 266 F2d 535 (CA9, 1959)	9
Horace Mann Ins. Co. v. Barbara B. 4 Cal.4th 1076	8
Intex v. United Nat. Ins. Co. 23 F3d 254 (9th Cir 1994)	3
Lumbermans Mut. v. Belleville Ind. 938 F .2d 1423, 1428 (1st Cir, 1991)	11
Montrose v. Superior Court 6 Cal.4th 287 (1993)	*passim*
Smith v. Hughes Aircraft 22 F. 3d 1432 (9th Cir, 1993)	*passim*
Smith v. Hughes Aircraft 783 F. Supp. 1222 (D. Ariz. 1991)	12
United States v. Diebold, Inc., 369 US 654, 8 L.Ed.2d 176, 82 S.Ct. 993 (1962)	13
Vann v. Travelers Companies 39 Cal. App. 4th 1610 (1995)	*passim*

Other Authorities

Webster's New Universal Unabridged Dictionary, Second Edition, Simon & Schuster,1983	12

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1996

ARTHUR A. LABOUR, *Petitioner,*

v.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Arthur Labour hereby respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 25, 1996. A timely petition for rehearing was denied by the Ninth Circuit Court of Appeals on December 4, 1996.

OPINIONS BELOW

The decision of the District Court is reported as American States Ins. Co. v. Sacramento Plating, Inc., 861 F. Supp. 964, 94 Daily Journal DAR 12868. The Decision of the Court of Appeals was issued on a "Not For Publication" basis. The decision of the Court of Appeals and the Order on the Petition for rehearing are set forth in Appendix A to this Petition.

BASIS FOR JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered in this action on October 25, 1996. A timely petition for rehearing was denied by the Ninth Circuit Court of Appeals on December 4, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment V provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ".

STATEMENT OF THE CASE

Basis of Federal Jurisdiction in the District Court And Facts Material to Consideration Of the Questions Presented

Subject matter jurisdiction in the District Court was properly based on diversity of citizenship under 28 U.S.C. § 1332. Plaintiff American States Insurance Co. was an Indiana corporation. Defendants were all California residents. Cross-Defendant Royal Insurance Company was an Illinois corporation.

I
Introduction

It is the contention of Petitioner/Appellant Labour that the District Court and the Court of Appeals below failed to follow California substantive law, as determined by the California Supreme Court in Montrose v. Superior Court, 6 Cal. 4th 287 (1993) and as further demonstrated in Vann v. Travelers Companies, 39 Cal. App. 4th 1610 (1995).[1] At issue in the case below, which was decided on summary judgment, was the question of whether, under the facts of the case, insurance coverage for environmental pollution damages was excluded by certain exclusionary language of certain commercial general liability policies issued in the early and mid-1980's.

---

[1] Federal Courts of Appeal will follow state appellate court decisions absent compelling evidence that the State's Supreme Court would decide differently. Intex v. United Nat. Ins. Co. 23 F3d 254 (9th Cir 1994).

The facts demonstrated that pollution of the soil below the concrete slab floor of a metals plating shop arose from four causes. One cause was the long term and gradual dripping and splashing of toxic chemicals onto the shop floor during normal operations. It is not disputed that pollution from this cause would not be covered under the applicable insurance policies. However, the evidence also clearly demonstrated that there were three additional and at least equally significant causes; causes for which insurance coverage should properly have been provided. These three additional causes arose from three large, isolated, infrequent, sudden and accidental incidents where the contents of chemical tanks containing hundreds of gallons of pollutants were also accidentally spilled and discharged onto the shop floor. The evidence showed that the shop floor was so degraded that it permitted the spills to escape into the soils beneath the slab floor. The insurance carriers and the District Court below at summary judgment denied insurance coverage to Petitioner/Appellant Labour for the three large sudden and accidental spills and refused to treat the three incidents as covered events because the regular business practices at the shop involved long term use and spillage of toxic chemicals. The Court of Appeals affirmed.

The decisions below failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced and failed to follow California substantive law on the subject. In particular, the Court of Appeals Memorandum decision (Appendix A, pg. A-1) asserts that "uncontroverted evidence in the record indicates (the 1981, 1984 and 1985) spills were not unexpected". Id. at A-5. The decision also asserts that "(t)he evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time."

(Emphasis added). Id. at A-6. As will be shown below, and as has been argued to the Court of Appeals, had the Court of Appeals given Labour the benefit of all reasonable and logical inferences from the facts adduced, and had the Court fully considered all the evidence, the Court could not have concluded that the evidence was "uncontroverted" and "unequivocal".

II
The Court Overlooked Montrose V. Superior Court And Vann V. Travelers

The decisions below overlooked and failed to follow California substantive law, as determined by the California Supreme Court in Montrose v. Superior Court, 6 Cal.4th 287 (1993) and as further demonstrated in Vann v. The Travelers Companies, 39 Cal. App. 4th 1610 (1995). These California court decisions demonstrate that when considering the propriety of awarding summary judgment in favor of a commercial general liability carrier which has denied insurance coverage for damages arising from pollution, the fact that regular business practices of the insured involved long term use and spillage of toxic chemicals" could **not** eliminate the possibility that at least some of the pollution damage might have resulted from accidental causes." (Montrose, pg. 305). (Emphasis added). To prevail at summary judgment, under California law, "the insurer must establish *the absence" of any potential for coverage.* (Id., pg. 300). The evidence adduced, when properly considered, does not establish the "absence of any potential for coverage"; indeed, the Perry Declaration (Excerpts of Record/ Court of Appeals, Tab 67) and "tell-tale

lead"[2] demonstrated in a consultant's report[3] proves the very existence of a potential for coverage based on the three spills in question. The three spills in question demonstrate that at least some of the pollution damage resulted from these three incidents; incidents which were "sudden and accidental", when all the evidence is properly considered. Thus, under California law, summary judgment should have been denied.

Although the District Court and the Court of Appeals in the case at bar relied heavily upon the case of Smith v. Hughes Aircraft, 22 F. 3d 1432 (9th Cir, 1993), neither District Court Judge Shubb (in American States Ins. Co. v. Sacramento Plating (86 F. Supp. 964) nor the Ninth Circuit Court of Appeals in Smith v. Hughes cited or appeared to have considered Montrose v. Sup. Ct., which had been decided a mere four days before the Court of Appeals decided Smith v. Hughes and six months before it was amended on rehearing.

Furthermore, Vann v. Travelers (a case decided by the California Court of Appeals in October of 1995 and which cites and discusses Montrose v. Superior Court) also confirms

---

[2] Elevated levels of lead were found in the soils beneath the concrete slab. This fact was referred to below as the "tell-tale lead" for the following reasons; Perry took over metal plating operations at the site in 1963; during Perry's operations, he did not use lead during his operations from 1963 to the cessation of business in 1989; yet elevated lead was found in the soils beneath the slab. The clear inference is that the lead in solution escaped through the degraded slab floor, thereby establishing that the slab floor was degraded before the three incidents in question.

[3] Excerpts of Record/ Court of Appeal, Tab 86, pg. BC 000713)

that for a court in California to properly consider a summary judgment motion, the court **must look not to whether noncovered acts predominate . . . but to whether there is any potential for liability.** (pg 1613). If the evidence shows that the pollution was caused **"in part, by a condition that developed so rapidly it could properly be described as a "sudden" event", then summary judgment is improper."**

Of significance is the fact that the Court in Vann, when offering an example of a "sudden and accidental" event, noted that the words "sudden and accidental" should be given a "common, ordinary meaning, relating to a release of toxic materials that is short in duration, **such as a burst storage tank**." (pg. 1613). In the case at bar, the evidence adduced regarding the three spills in question showed that on two specific occasions a **storage tank liner ruptured** and on the third occasion a storage tank was inadvertently **allowed to overflow during a filling operation**. In each instance, according to the Perry Declaration, toxins were released onto the cement floor at a specific point in time, *to wit*, "Spring, 1981"; "June, 1984"; and "May, 1985". The evidence further showed that at the time of each of the three spills in question Perry believed the chemical spills went down the drain and into the sewer. However, it may be inferred from the facts adduced, (particularly from the evidence of the "tell-tale" lead in the soil beneath the slab in higher than background levels and the fact that lead was not used by Perry), that the cement floor was degraded prior to the three spills in question and thereby provided a "pollution track" through the cement to the underlying soils.

The Vann Court also noted, citing another California

Supreme Court case, that "(a)ny doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor" (Vann, at page 1618, citing Horace Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 1081). The decisions by the courts below in the case at bar overlooked both Montrose v. Superior Court and Vann v. Travelers and the decisions below fail to follow California law.

III
The Decisions Overlooked and Failed to Afford Labour The Benefit of All Reasonable and Logical Inferences From the Facts Adduced

The decisions below also overlooked and failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced. In particular, the decision by the Court of Appeals wrongly asserts that "uncontroverted evidence in the record indicates (the 1981, 1984 and 1985) spills were not unexpected". The decision also wrongly asserts that "(t)he evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time." (Emphasis added). Had the Court of Appeals considered all the evidence and had it given Labour the benefit of all reasonable and logical inferences from the facts adduced, the Court could not have concluded that the evidence was "uncontroverted" and "unequivocal".

Undoubtedly, the Court of Appeals looked to paragraph 12 of the Perry Declaration. (Excerpts of Record/ Court of Appeals, Tab 67). Paragraph 12 reads as follows:

> "12. The tank content losses described above were not reported to any governmental

> agencies or to any insurance companies or insurance brokers or agents. These events were not considered insurable by me at the time they occurred. They arose from general business hazards which I **expected** to occur in SACRAMENTO PLATING, INC.'s operations at the Site, even thought I did not want them to happen since replacement of any chemical bath solutions is a substantial business expense. These incidents involving loss of tank contents as well as the daily splashing and dripping of chemicals from the baths during the plating of bumpers and other processed parts were a **normal part** of the business at the Site throughout the time it was occupied by me and operated as SACRAMENTO PLATING, INC." (Emphasis added).

At first blush, one might interpret paragraph 12 to mean that the three polluting events in question were "expected" and that they were a "normal part" of business operations. However, a careful reading of paragraph 12 and a careful review of the other facts attested to by Perry tend to support a contrary conclusion, as will be shown below. Summary Judgment should be denied where an issue of fact arises from the "countering inferences" which are permissible from evidence accepted as true. Cameron v. Vancouver Plywood Corp., 266 F2d 535 (CA9, 1959). It is the Perry Declaration and this paragraph in particular that must be read with an understanding of who the "messenger" of this message truly was. Perry was also an insured, but filed bankruptcy and therefore did not oppose the summary judgment motion. The

Perry Declaration is on the pleading paper of the law firm and attorney for the one of the insurance carriers. The name of the firm then representing the insurance carrier, (not Perry's own attorney) is printed on the bottom of each page of Perry's Declaration. So although one might be tempted to interpret paragraph 12 to mean that the three polluting events in question were "**expected**" and that they were a "**normal part**" of business operations, a close reading of paragraph 12 together with the balance of the Perry Declaration shows that the evidence was not "uncontroverted" and was not "unequivocal", as the Court of Appeal's Decision claims and as Perry's Declaration attempts to conclude.

In this regard, in particular, the evidence shows "countering inferences". Perry was in charge of and operated his business at the site from 1963 to 1988 (Perry Dec., ¶ 1). Under Perry's supervision, the electroplating processes occurred on a full-time daily basis for the 25 year period from 1963 to 1988. (Perry Dec., ¶ 5). During the electroplating process, parts were immersed in tanks containing chemical baths and the parts were moved by hand from bath to bath. (Perry Dec., ¶ 7). In moving the parts from bath to bath, chemicals in liquid form would normally splash and/or drip off the parts onto the wooden catwalk surfaces and to the flooring. (Perry Dec., ¶ 7). During the 25 year period of operations by Perry, Perry could only recall three incidents where loss of chemical bath liquids occurred (other than during the course of daily operations). (Perry Dec., ¶ 11).

Clearly, if only three such incidents with "large" releases occurred over a twenty five year period, those three incidents were not the "norm". The "norm", as Perry's Declaration shows, was for the contents of a chemical tank to

remain in the tank, except for the drips that occurred as parts were being moved. **Here, referring to the three spills in question, the District Court noted that "large amounts" of toxins were "infrequently" released onto the floor.** (861 F. Supp. 964, 970). Lumbermans Mut. v. Belleville Ind., 938 F .2d 1423, 1428 (1st Cir, 1991) teaches that a "coverable occurrence would be clearly identifiable as sudden and accidental because it would be a marked departure from normal operations". (Emphasis added). Where pollution is "part and parcel of daily conduct, there is the possibility of infinite variations on the usual theme, polluting events are likely to occur that are on the fringe of normal operations" (pg. 1428) and thus a microanalysis of a continuous pattern of pollution would result in an "ill-fated effort to distinguish between virtually indistinguishable occurrences." (Pg. 1428). However, the three "large" and "infrequent" spills in the case at bar here are very much distinguishable from frequent dripping and splashing which occurred on a daily basis. The three spills clearly were a "marked departure from normal operations". As the District Court noted, the three spills in question resulted in "large amounts" of toxins being "infrequently" released onto the floor. (861 F. Supp. 964, 970).

This is very much unlike Smith v. Hughes. The Court of Appeals in Smith v. Hughes said that the "evidence unequivocally demonstrates that the pollution was gradual". The Court of Appeals would not permit Hughes to "break down its long term practices into temporal components." (Pg. 1438). But, unlike the case at bar, there was good reason in Smith v. Hughes to refuse to break down the long term practices into temporal components. Although not recited by this Court of Appeals in its recitation of the facts in its opinion

in Smith v. Hughes, that reason is found in the District Court's decision (783 F.Supp 1222) where we learn that the proffered events in Smith v. Hughes were not entitled to be considered "sudden and accidental" because they were not infrequent. The District Court's decision in Smith v. Hughes reveals that "Hughes encountered periodic episodes where its waste treatment plant broke down or was over-capacitated." (at 783 F. Supp 1222, 1232, Footnote 14). (Emphasis added). WEBSTERS defines "Periodic" as "Re-occurring at regular intervals". Thus, in Smith v. Hughes, the proffered events were not infrequent, but rather they were "periodic episodes"; episodes "re-occurring at regular intervals". Said another way, in Smith v. Hughes the proffered events were *frequently* occurring events. Thus, the court in Smith v. Hughes rightly rejected the proffered events in that case.

However, in the case at bar here, as contrasted to the un-quantified but daily occurring drips and splashes, Perry could only recall three distinct large spills over a twenty five year period. Perry's Declaration shows that these three spills were not a part of the long term practices; they were not frequently repeated events. Just three events in over twenty five years of operations by Perry can hardly be said to be "periodic episodes", as the District Court found in Smith v. Hughes. In the case at bar, the three events offered to justify insurance coverage were not part of the normal operations, they were not events which were "re-occurring at regular intervals", they were not "periodic episodes". They were "infrequent" events! Each was, as Lumbermans teaches (at page 1428), "**a marked departure** from normal operations"! "Infrequent" events over a 25 year period cannot fairly be considered as "periodic"; yet that is exactly what the Courts below in the case at bar have done.

REASONS FOR GRANTING THE WRIT

Environmental clean up is a matter of grave importance to all. If the insurance industry does not pay their fair share under the policies that the industry has issued across this country, then the additional expense and added burden will fall on us all, whether as individuals or as tax-payers. In the case at bar, the evidence showed that there were four main causes of the pollution; one cause was not covered by insurance, but the other causes would warrant coverage, had not the Court of Appeals entered a decision that conflicts with a decision of the court of last resort of the State of California. The Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court as to call for the exercise of this Court's supervisory power.

The Courts below failed to follow United States v. Diebold, Inc., 369 US 654 and thus failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced. Furthermore, the courts below overlooked Montrose v. Superior Court and Vann v. Travelers and thereby failed to follow established California law. In so doing, the Courts below added a new and additional requirement to the insurance contract.

CONCLUSION

While paragraph 12 of the Perry Declaration offers a simplistic conclusion, upon which the insurance carriers have been only too happy to have the Courts below focus, the balance of the Perry declaration shows that there was evidence of "countering inferences" to support the contention that the

three spills were not part of the normal operations and that the pollution also resulting from these three spills was therefore "sudden and accidental". Thus, the claim in the decision by the Court of Appeals that the evidence is "uncontroverted" and "unequivocal" could only be made if the Court overlooked the evidence of "countering inferences" in the Perry Declaration which tends to establish that the three spills were **not** a part of normal operations. The Perry Declaration, when properly considered, does not establish the "absence of any potential for coverage", as Montrose v. Superior Court requires to justify summary judgment in California in favor of the carriers. Indeed, the Perry Declaration proves the existence of coverage based on the three spills in question. Labour deserved to have a trial in order to determine the extent of pollution caused by the un-quantified daily drips and splashes as compared to the pollution caused by the three large and infrequent "sudden and accidental" polluting events where hundreds of gallons of toxin were released into the environment. Under California law the court **must look not to whether noncovered acts predominate . . . but to whether there is any potential for liability.** (pg 1613). If the evidence shows that the pollution was caused **"in part, by a condition that developed so rapidly it could properly be described as a "sudden" event", then summary judgment is improper.** " Simply put, the Court of Appeals below failed to follow the law.

Although the decisions below are financially devastating to Labour, he is just but one individual. The decisions below, unless reversed, will fall heavily on us all. Unless reversed, the insurance industry as a whole will now be able to take great advantage of their insureds by citing the District Court's published decision and asserting the claim that

any amount of gradual pollution at a site from ongoing operations will defeat any claim for coverage under the "sudden and accidental" exception to the limited pollution exclusion, no matter how big the accident and no matter how unexpected the event. In the late 1970's and the 1980's the insurance industry sold a standardized policy which claimed they would cover damages for "sudden and accidental" pollution. The Courts below, by their decisions in the case at bar, have now added a new clause to those insurance contracts in favor of the carriers. Now an insured will not only have to show that pollution occurred as a result of a "sudden and accidental" incident, but the insured will also have to show that there is no evidence of any gradual pollution at the site, as well. Let there be no mistake about it, the insurance industry will benefit greatly from this decision; a decision which leaves in place a summary judgment in favor of the insurers while overlooking and ignoring established California law. This decision strips insureds of their rights to insurance coverage for "sudden and accidental" pollution under the policies in question, wherever some amount of "gradual" pollution may also have occurred.

Based on the foregoing, Petitioner/Appellant Labour respectfully requests this Court grant relief and issue its writ of certiorari.

Respectfully submitted,
Theodore S. Wentworth
Counsel of Record
James D. White
Robert S. Lewin
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 25, 1996

AMERICAN STATES INSURANCE COMPANY Plaintiff - counter - defendant - Appellee, v. SACRAMENTO PLATING INC.; RICHARD PERRY; ARLENE PERRY; DALE CARTER; RAR MARKETING INC; ALICE KAZANJIAN, Defendants, and ARTHUR LABOUR, Defendant -counter-claimant- Appellant, v. ROYAL INSURANCE COMPANY OF AMERICA, Counter defendant Appellee.	NO. 94 - 16905 D.C. No. CV- 93-569-WBS Memorandum*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding
Argued and Submitted September 16, 1996
San Francisco, California

Before: BEEZER and THOMPSON, Circuit Judges, and GILLMOR,** District Judge.

Arthur A. Labour appeals the district court's entry of summary judgment for American States Insurance Company ("ASI") and Royal Insurance Company ("Royal") in an action for declaratory judgment and breach of contract arising out of ASI's and Royal's refusal to provide coverage under several comprehensive general liability policies for costs associated with Labour's compliance with an "Imminent and Substantial Endangerment Determination and Order" issued by the California Environmental Protection Agency Department of Toxic Substances Control ("Cal-EPA Order") regarding environmental pollution on Labour's Property. The district court held that the "qualified pollution exclusions" found in the relevant ASI and Royal policies precluded coverage as a matter of law. We have jurisdiction pursuant to 28 U.S.C. § 1291. We conclude that the district court properly exercised jurisdiction over this matter, and we affirm as to all other issues raised on appeal.

I.

Royal asserts that Labour waived his right to challenge the summary judgment decision on appeal by filing a statement of nonopposition to Royal's motion in the proceedings below.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Helen Gillmor, United States District Judge for the District of Hawaii, sitting by designation.

Where, as here, Labour consented to entry of summary judgment by the district court, "we have 'followed the practice of looking at the language of the consent judgment and other evidence in the record to determine whether a party may appeal following an order entered by consent.' " Paracor Finance, Inc. v. General Elec. Capital Corp., 1996 WL 552678 *15 (9th Cir. 1996) (quoting Blair v. Shanahan, 38 F.3d 1514, 1521 (9th Cir. 1994), cert. denied, -- U.S. --, 115 S.Ct 1698 (1995)); Shores v. Sklar, 885 F.2d 760, 762 (11th Cir. 1989), cert. denied, 493 U.S. 1045 (1990). It is apparent from the record that at least Labour and the district court believed that Labour had reserved the right to appeal from Royal's summary judgment, id., and Labour in fact exercised this right in a timely fashion by filing his notice of appeal on October 14, 1994, 30 days after the district court's September 14, 1994 entry of such judgment. See Fed.R.App.Proc. 4(a). We therefore conclude that Labour did not waive his right to appeal from the district court's entry of summary judgment in Royal's favor.[1]

II.

Before reaching the merits of Labour's appeal, we

---

[1] Although less than clear, Royal appears to assert that Labour did not file a timely notice of appeal from the district courtis entry of judgment for ASI. ASI has not raised this issue. Even if ASI had, however, it should be resolved in Labour's favor. ASI's judgment, dated August 29, 1994, does not contain an express determination that there was no reason for delay, and it does not expressly direct entry of a final judgment. It therefore became final when the district court disposed of Labour's remaining crossclaims against Royal by judgment entered September 14, 1994. As discussed in the text above, Labour filed a notice of appeal on October 14, 1994, 30 days after entry of final judgment. The appeal was timely. See Kreines v. U.S., 959 F.2d 834, 836 (9th Cir. 1992).

consider whether the district court abused its discretion by exercising jurisdiction over the case. In deciding whether a district court abuses its discretion by entertaining a declaratory relief action, we consider whether "there are 'circumstances present to warrant an exception' to the general rule that the action belongs in state rather than federal court." Employers Reinsurance Corp. v Karussos, 65 F.3d 796, 799 (9th Cir. 1995) (quoting American National Fire Insurance Co. v. Hungerford, 53 F.3d 1012, 1019 (9th Cir. 1995)). In the instant case, the district court expressly weighed the factors bearing upon the discretionary exercise of federal court jurisdiction, and decided to retain the declaratory relief action. We conclude that the circumstances of this case did not obligate the district court to exercise its discretion to decline jurisdiction over the declaratory relief claims, especially in light of Labour's breach of contract counter-claims and cross-claims against ASI and Royal, respectively. Dismissal of the declaratory relief claims would have resulted in piecemeal litigation because the breach of contract claims would still be pending before the court. See Maryland Casualty Co. v. Knight, F.3d --, --, 1996 WL 544213 *4. In addition, dismissal at this stage will frustrate the interests of judicial economy because, as discussed below, the district court correctly decided the case on the merits. See id.

We now consider the appeal on its merits.

III

We review de novo a grant of summary judgment. Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine, disputed issues of material fact and whether

the district court correctly applied the relevant substantive law. Id.

On appeal, Labour contends that the district court erred in concluding that the evidence of the three tank spills in 1981, 1984 and 1985 did not raise a triable issue of fact as to whether a "sudden and accidental"' discharge caused part of the contamination at the Property. The relevant ASI and Royal policies contain qualified pollution exclusions which exclude from coverage all claims for injury or damage caused by a discharge, dispersal, release or escape of pollutants (a "discharge"), but except from this exclusion injury or damage caused by "sudden and accidental" discharges. Under California law, a "sudden and accidental" discharge is one that is abrupt, unexpected and unintended. See, e.g., Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 714, 755, 15 Cal.Rptr.2d 815 (1993). Gradual pollution is unambiguously excluded from coverage. ACL Technolouies. Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773, 1787, 22 Cal.Rptr.2d 206 (1993).

The insured has the burden of proving a claim is covered under an exception to an exclusion, Aeroquip Corp. v. Aetna Casualtv Surety Co.. Inc., 26 F.3d 893, 894-95 (9th Cir. 1994), and Labour presented no evidence from which it could be inferred that the soil contamination was caused by a "sudden and accidental" discharge. Even if the concrete floor was degraded prior to 1981, as Labour would have us infer, the three tank spills in 1981, 1984 and 1985 did not involve soil contamination caused by an abrupt, unexpected and unintended discharge. The uncontroverted evidence in the record indicates that these spills were not unexpected, and that at least one of these spills resulted from corrosion -- a

condition that was not abrupt, but rather occurred over time due to lack of maintenance. In addition, the occasional tank spills onto the floor occurred in the context of daily drippings and spills of toxic liquids onto the floor over many years. The district court, therefore, correctly applied Smith v. Hughes Aircraft, 22 F.3d 1432 (9th Cir. 1994). Labour's effort to break down their long term electroplating practices in handling the chemical fluids into temporal components must be rejected. Id. at 1438. The evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time.

We conclude that the district court properly entered summary judgment in favor of ASI and Royal. Labour's proffered evidence of the three tank spills did not raise a triable issue of fact regarding coverage under any ASI or Royal policy.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 4, 1996

AMERICAN STATES INSURANCE COMPANY Plaintiff - counter - defendant - Appellee, v.	)	NO. 94 - 16905
	)	D.C. No. CV- 93-569-WBS
SACRAMENTO PLATING INC.; RICHARD PERRY; ARLENE PERRY; DALE CARTER; RAR MARKETING INC; ALICE KAZANJIAN, Defendants, and	)	ORDER
ARTHUR LABOUR, Defendant -counter-claimant- Appellant, v.	)	
ROYAL INSURANCE COMPANY OF AMERICA, Counter defendant Appellee.	)	

Before: BEEZER and THOMPSON, Circuit Judges, and GILLMOR,** District Judge.

The petition for rehearing is denied.

** Honorable Helen Gillmor, United States District Judge for the District of Hawaii, sitting by designation.

Supreme Court, U.S.
FILED
961609 MAR 4 1997
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARTHUR A. LABOUR,
Petitioner,

vs.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

THEODORE S. WENTWORTH
Counsel of Record

JAMES D. WHITE
ROBERT S. LEWIN
Attorneys at Law

500 Newport Center Drive, Suite 740
Newport Beach, California 92660
(714) 497-3102

Attorneys for Petitioner
ARTHUR A. LABOUR

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF CALIFORNIA

FILED
AUGUST 29, 1994

AMERICAN STATES INSURANCE CO., Plaintiff,	)	No. Civ.S-93-0569-WBS/PAN
v.	)	MEMORANDUM AND ORDER
SACRAMENTO PLATING, INC., et al., Defendants.	)	

SHUBB, District Judge.

American States Insurance Company ("ASI") brought this action seeking a declaration that certain ASI comprehensive general liability ("CGL") policies do not cover clean-up costs resulting from the contamination of soil below a Sacramento metal electroplating facility. The defendants are the property owners and the operators of the facility.

ASI has filed a motion for summary judgment on its claim for declaratory relief and on defendant Arthur LaBour's counterclaims. Only LaBour, the current property owner, filed a memorandum in opposition to ASI's motion. Because

the court finds that the pollution exclusions contained in ASI's policies preclude coverage, the motion for summary judgment will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Property

The dispute centers on four parcels of property located on "S" Street in Sacramento, California. On one parcel, located at 2809 "S" Street, was an industrial electroplating facility. In 1963, defendants Richard and Arlene Perry ("Perry") entered into a contract to purchase the property from defendant Alice Kazanjian. In February 1972, title was transferred from Kazanjian to Perry.

From 1963 to 1988, Perry, the former owner and general manager of Sacramento Plating, Inc. ("SPI"), operated the electroplating facility. During that time, Richard Perry "was physically at the site watching and participating in the electroplating processes on a full-time daily basis...." Perry Decl. ¶ 5. LaBour purchased the property from Perry in January 1981. After purchasing the property, LaBour leased it back to Perry until October 1989. LaBour is the present owner of the property.

B. The ASI Policies

ASI issued CGL policies covering Perry/SPI and LaBour for different periods of time during SPI's operation at the "S" Street site. ASI issued two policies to Perry/SPI for two one-year periods between March 6, 1984 and March 6, 1986 (hereinafter "S1" and "S2"). ASI may have issued a

third one-year policy covering the period of time between March 6, 1986 and March 6, 1987 (hereinafter "S3").[1]

ASI issued LaBour a total of three CGL policies. The first two policies covered two one-year time periods from March 23, 1984 to March 23, 1986 (hereinafter "L1" and "L2"). The third policy period began March 23, 1986, but was cancelled effective May 21, 1986 (hereinafter "L3").

C. The CAL-EPA Order

On April 22, 1992, the California Environmental Protection Agency Department of Toxic Substances Control ("CAL-EPA") issued an "Imminent and Substantial Endangerment Determination and Order" ("the Order") concerning the "S" Street property. The Order named as "responsible parties" LaBour, Richard Perry, and others connected with the operation of SPI.

In the Order, the CAL-EPA made the following finding:

> During the period that Sacramento Plating operated at the Site (1972-1990), various chemicals were handled and stored inside and immediately outside of the plating shop building. Over time these chemicals were discharged to the concrete floor underlying the plating shop and in the rear storage area. The chemicals either spilled/leaked from the storage tanks, were discharged to the floor from plating tanks as a result spillage [sic], or due to the dipping of parts being

---

[1] The parties agree that the policy may have been issued, but that it cannot, at present, be located.

plated.

The CAL-EPA took samples from inside the plating shop and from the soil under the shop's concrete floor and discovered lead, chromium, copper, antimony, nickel, and cyanide contamination. It explained that these chemicals present a danger to humans through direct contact by way of inhalation, absorption, and/or ingestion. The people at risk were determined to be transients who might enter the building, firefighters who might be called to the building, and nearby residents who could "be exposed through inhalation of dusts and gases generated by heating of contaminants."

The Order directed that particular remedial action be taken. The parties were directed to prepare a "Preliminary Endangerment Assessment" ("PEA report") evaluating the magnitude of the hazard, the danger to public health, and the necessary "remediation action(s)." A Project Coordinator was to be appointed to provide oversight, and the parties were to prepare a "Sampling Plan which describes the activities which will be undertaken to provide a preliminary profile of the contamination at the site." Upon completion of the necessary reports, the parties were to take all required steps to "stabilize and eventually remediate" the hazard.

In addition to requiring the PEA report, the CAL-EPA Order also made clear that all costs incurred in complying with the Order were to be borne by the parties. It stated that the parties could also be liable for statutory fees imposed under state or federal law. And it reserved the right to require the parties to compensate the state for any costs the state incurred in its work at the site.

D. The PEA Report

An environmental consulting firm, Brown and Caldwell ("BC"), was retained by LaBour to analyze the nature and extent of the contamination and to prepare the PEA report. The report, according to BC was "the first step in the remediation process and indicates whether or not further cleanup is needed on site, assesses the immediate danger, if any, to the public, and recommends the course of further action."

BC studied the now-abandoned plating facility and took samples of the soil underneath the concrete flooring. It identified a number of hazardous toxic substances in the soil that were deposited by the plating operation.

> Degraded concrete and standing water in some drain lines indicate possible soil contamination due to dysfunctional drainage and degraded foundation. Some crystals were noted in one of the drain lines. These crystals are an indication of heavy accumulations of some constituents.

BC found unsafe levels of chromium, copper, nickel, and lead in the soil.

The PEA report concluded that "[p]ast practices at the site have resulted in elevated levels of metals in the underlying soils." Although the site was not found to pose a significant threat to the general public, BC found that transients sleeping in the building were at immediate risk. BC recommended further study as to whether the contaminants were migrating from under the plating facility to neighboring property or into the groundwater.

Although LaBour complied with the order to have the PEA report prepared, he has taken no action to "stabilize" or "remediate" the contamination. LaBour Decl. P 3-4. On July 6, 1994, CAL-EPA notified LaBour that he has "not taken the required actions to satisfy Section 16.5 Removal/Remedial Actions of the Order." See LaBour Decl.Ex. B (Letter from Wolfenden to LaBour of 7/6/94). As a result, CAL-EPA will perform the necessary cleanup "and seek recovery for all costs incurred, including administrative costs." Id.

E. The Coverage Dispute

1. ASI's rejections of LaBour's coverage request

On June 15, 1992, LaBour notified ASI of the CAL-EPA Order and requested that ASI defend and indemnify him. ASI Compl. ¶ 14. ASI responded with its opinion that it has no liability to cover or defend LaBour or any other party "for the claimed relief under the Order." ASI Request for Judicial Notice Exh. 3, at 2 (filed Feb. 1, 1994). ASI, therefore, declined to cover LaBour for any financial expenditure, past or future, connected with LaBour's compliance with the Order. [2] *Id.*

2. LaBour's state court action

On September 28, 1992, LaBour filed suit in

---

[2] ASI also advised Perry and SPI of the EPA order and of its position that it had no coverage liability for expenses or damages incurred by Perry or Sacramento Plating under the Order. ASI Compl. ¶ 15; ASI Request for Judicial Notice Exh. 2 (filed Feb. 1, 1994).

Sacramento County Superior Court against Perry, SPI, and others. LaBour asserted that the named defendants

> caused the discharge/release/disposal of hazardous substances on, in, and under the Subject Property during the term of Defendant's ownership, lease or possession of the Subject Property, and that these materials were not removed by Defendants, but remain on the Subject Property to the present time creating hazardous conditions on the Subject Property.

LaBour Super.Ct.Compl. ¶ 23. He further claimed that he was not responsible for any damage to the property. LaBour Super.Ct.Compl. ¶ 24.

LaBour pleaded fourteen different state-law causes of action against various combinations of the defendants. He asked the court for compensatory, general, and treble damages; a declaration that the defendants were liable to him for all costs incurred responding to the Order; costs of suit and attorneys fees; and other relief. LaBour Super.Ct.Compl. at 24-25.[3]

On October 20, 1992, Perry/SPI notified ASI of the complaint and requested defense and indemnification. ASI assumed the defense subject to its full reservation of rights.

---

[3] On November 5, 1993, LaBour filed a motion asking the court to abstain from exercising jurisdiction over the federal action. On February 8, 1994, the court denied LaBour's motion pursuant to American States Ins. Co. v. Kearns, 15 F.3d 142 (9th Cir.1994).

3. ASI's federal declaratory judgment action

On April 5, 1993, ASI filed this declaratory judgment action. ASI asks the court to declare its rights and responsibilities under its insurance contracts with LaBour and with Perry and SPI. Specifically, it seeks a declaration that it has no obligation to defend or indemnify LaBour or Perry/SPI with regard to the CAL-EPA Order, nor an obligation to defend or indemnify Perry/SPI with regard to LaBour's state court action.

Both LaBour and Perry/SPI answered ASI's complaint. LaBour then filed a counterclaim against ASI and a crossclaim against the Royal Insurance Company ("Royal"). LaBour alleges that in refusing to defend or indemnify him with regard to the CAL-EPA Order, the two insurance companies breached their contracts with him. In addition to damages for breach of contract, LaBour seeks a declaration that ASI and Royal are obligated to defend him from CAL-EPA's claims and indemnify him for any losses, damages, or costs resulting from those claims.

II. LEGAL STANDARDS

The court must determine, viewing the evidence in the light most favorable to LaBour, whether ASI has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); Continental Casualty Co. v. City of Richmond, 763 F.2d 1076, 1079 (9th Cir.1985).

Because the court's jurisdiction is based on diversity of citizenship and the insured property is located in California,

California substantive law applies. *See* Insurance Co. of Pennsylvania v. Associated Int'l Ins. Co., 922 F.2d 516, 520 (9th Cir.1990); Continental Casualty, 763 F.2d at 1079. "An insurance policy, like all contracts, is to be interpreted to effectuate the mutual intent of the parties." Titan Corp. v. Aetna Casualty & Sur. Co., 22 Cal.App.4th 457, 469, 27 Cal.Rptr.2d 476 (1994). "The 'clear and explicit' meaning of the contract provisions, as interpreted in their 'ordinary and popular sense,' controls the court's interpretation." Western World Ins. Co. v. Dana, 765 F.Supp. 1011, 1013 (E.D.Cal.1991) (quoting AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 822, 274 Cal.Rptr. 820, 799 P.2d 1253 (1990)).

When a policy clearly excludes coverage, the court "will not indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage." Titan Corp., 22 Cal.App.4th at 469, 27 Cal.Rptr.2d 476. "An insurer is entitled to limit its coverage to defined risks, and if it does so in clear language, [the court] will not impose coverage where none was intended." *Id.*

III. DISCUSSION

ASI contends that the pollution exclusions contained in each of the policies it issued to LaBour and Perry/SPI bar coverage as a matter of law.[4]

---

[4] Alternatively, ASI argues that because the pollution was not discovered until after the policy periods expired, the policies do not cover the pollution. The lower California courts are split regarding the proper test to apply in resolving this issue. Some courts have held that the question is whether the pollution "manifested" itself in the form of property damage during the insurance policy period. *See, e.g.*, Pines of La Jolla Homeowners Ass'n v. Industrial Indem., 5 Cal.App.4th 714,

A. The Policy Language

The ASI policies issued to LaBour and Perry/SPI contain two different pollution exclusions. The L3 and S3 policies contain absolute pollution exclusions. The parties agree that the absolute exclusions bar coverage under these policies.

The L1, L2, S1, and S2 policies also contain pollution exclusions. These exclusions, however, contain an exception for "sudden and accidental" pollution:

> Exclusions--This insurance does not apply:
>
> . . . . .
>
> (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids,

---

720-22, 7 Cal.Rptr.2d 53 (1992). Other courts have held that the question is whether there was a "continuing injury" caused by contamination which occurred during the policy period. *See, e.g.*, Montrose Chem. Corp. v. Admiral Ins. Co., 20 Cal.App.4th 678, 695-97, 5 Cal.Rptr.2d 358 (1992). On May 21, 1992, the California Supreme Court granted review of the Montrose Chemical case. See 24 Cal.Rptr.2d 661, 862, P.2d 661 (1992). The Supreme Court's decision in that case should definitively resolve the issue regarding the appropriate test.

Because the court grants ASI's motion upon the grounds that coverage is precluded by the pollution exclusions, it does not reach this argument. If the court were not able to decide this motion on other grounds, however, a different approach might be appropriate. *See* C. Wright, *et al.*, Federal Practice and Procedure s 4246, at 111 (1988). *Cf.* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27, 79 S.Ct. 1070, 1072, 3 L.Ed.2d 1058 (1959) (recognizing "the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law" and affirming abstention pending decision by state court).

> alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental; ....

"Under California law, the interpretation of an exclusionary clause [in an insurance contract] is an issue of law upon which the court must make its own independent determination." Continental Casualty, 763 F.2d at 1079; Truck Ins. Exchange v. Pozzuoli, 17 Cal.App.4th 856, 859, 21 Cal.Rptr.2d 650 (1993). The burden is on the insured, LaBour in this case, to prove that the "sudden and accidental" exception to the pollution exclusion applies. Aeroquip Corp. v. Aetna Casualty & Sur. Co., 26 F.3d 893, 895 (9th Cir.1994) (per curiam).

B. ASI's Evidence of Gradual Pollution

ASI argues that LaBour has not carried his burden. ASI points to undisputed evidence that for twenty-five years toxic chemicals were regularly spilled onto the concrete floor of the plating facility. According to Richard Perry,

> During the electroplating process, various automobile parts to be plated (primarily steel bumpers) were cleaned, rinsed and plated with use of chemical solutions in the plating room. The parts would be immersed in chemical baths with platers (i.e. employees of SACRAMENTO PLATING, INC.) moving the parts by hand from bath to bath through the process. *In doing so, the chemicals in liquid form*

> *would normally splash and/or drip off the parts, onto the catwalk surfaces and from there to the flooring as each part was being transferred from one chemical bath to the next. Chemical solutions would also drip down the sides of and off the tanks causing a residue on the sides of the tanks.*

Perry Decl. ¶ 7 (emphasis added). As the parts that were being treated were moved between the chemical baths, "chemicals that were spilled, splashed or dripped off the parts were also washed down the slanted flooring into the drainage system and from there into the sewer on a daily basis while the facility was in operation." Perry Decl. ¶ 9 (emphasis added).

The deposition testimony of Joe Yun corroborates Perry's account.[5] Yun is a scientist and environmental consultant employed by BC. He was a project manager in charge of preparing the PEA Report regarding LaBour's

---

[5] LaBour objects to Yun's deposition testimony on the ground that there are insufficient foundational facts regarding Yun's qualifications and as to the scientific methods used to reach his conclusions. The objection is overruled. In considering a motion for summary judgment, the court has broad discretion in ruling upon the admissibility of expert testimony. *See* Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir.1988) (per curiam). ASI has attached to its moving papers those portions of Yun's deposition upon which it relies. Those excerpts set forth Yun's qualifications as well as his opinions. Under Fed.R.Evid. 705, an expert may testify in terms of opinion without first testifying to the underlying facts or data. He may then be required to disclose the underlying facts or data on cross-examination. Counsel for LaBour had the opportunity to cross-examine Yun on both his qualifications and the methods used to reach his opinion, but chose not to provide the court with any portions of the deposition which would call into question either the witness' qualifications or the bases of his opinions.

property. Based on his visual inspection of the facility and subsequent soil samples, Yun testified that it was his opinion that the drain in the concrete floor of the plating shop "has been degraded over time, so any solution in those drains have access to the underlying soils." Yun Dep. 70:17-20; 71:3- 8. When asked what events likely caused the soil contamination, Yun stated:

> Likely events which caused contamination at that site would include degradation of the drainage system over time from chemicals or substances that went through the drainage system subsequently exposing underlying soils, allowing those materials that use the drainage system access to the soils under the building.

Yun Dep. 307:13-19.

C. LaBour's Evidence of "Sudden and Accidental" Pollution

Notwithstanding this evidence, LaBour argues that three specific incidents raise a triable question as to whether the soil contamination was "sudden and accidental." Richard Perry witnessed three large spills during the 1980s. In 1981, acid copper liquid in a tank in the plating facility escaped through a hole in the tank or in the tank's liner. The liquid poured onto the concrete floor and into the drainage system. Perry Decl. ¶ 11. In June 1984, an 800-gallon nickel plating tank overflowed when a water hose was left running in the tank. The contents of the tank ran onto the floor and into the drain. *Id.* Finally, in May 1985, 400-gallons of chemical from a different nickel plating tank were released from a hole in the tank or its liner and flooded onto the floor and down the drain. *Id.* ASI does not dispute that these incidents occurred.

LaBour concedes that "at some unspecified time" the concrete floor or the drainage system was compromised. As a result, he reasons, when the three large spills occurred, the chemicals may have been carried into the soil below the floor--thus causing the contamination. LaBour contends, first, that these spills were "sudden and accidental," and, second, that they create a genuine issue of material fact as to whether the contamination itself was "sudden and accidental."

Under California law, the term "sudden and accidental," as used in CGL policies, is not ambiguous. *See* Pozzuoli, 17 Cal.App.4th at 860, 21 Cal.Rptr.2d 650; Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 752-56, 15 Cal.Rptr.2d 815 (1993). "[I]n the phrase, 'sudden and accidental,' 'accidental' conveys the sense of an unexpected and unintended event, while 'sudden' conveys the sense of an unexpected event that is abrupt or immediate in nature." Shell Oil, 12 Cal.App.4th at 755, 15 Cal.Rptr.2d 815. "Sudden and accidental" pollution, the Court of Appeal has stated, "unambiguously does not include gradual pollution." ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773, 1787, 22 Cal.Rptr.2d 206 (1993).

In two recent cases, the state Court of Appeal denied coverage on the ground that the pollution in question was gradual. In Pozzuoli, the owners of a gas station sought insurance coverage for property damage resulting from a gasoline leak in an underground storage tank. 17 Cal.App.4th at 858, 21 Cal.Rptr.2d 650. Their CGL policy contained the standard pollution exclusion with an exception for "sudden and accidental" pollution. *Id.* It was undisputed that the gasoline leakage was gradual and occurred over a long period

of time. *Id.* at 859-60, 21 Cal.Rptr.2d 650. The court held that because "the pollution process was both continuous and long-term," the "sudden and accidental" exception did not apply and coverage was barred by the pollution exclusion. *Id.* at 861, 21 Cal.Rptr.2d 650. *See also* ACL Technologies, 17 Cal.App.4th 1773, 22 Cal.Rptr.2d 206 (coverage unavailable because pollutants escaped from underground storage tanks through leaks caused by corrosion, and that corrosion occurred gradually over extended period of time).

The present case is somewhat different because in addition to evidence of gradual contamination, there were the three incidents witnessed by Perry which LaBour argues may have caused "sudden and accidental" pollution. The court finds, however, that these incidents do not create a triable issue of fact for three reasons.

First, as a matter of law the incidents were not "sudden and accidental." "An 'accidental' event is both unintended and unexpected; omitting either leaves an important part of the word's meaning unexpressed. A 'discharge, dispersal, release or escape' of pollutants that is expected is not accidental, regardless of whether it was not intended." Shell Oil, 12 Cal.App.4th at 755, 15 Cal.Rptr.2d 815. The three events identified by Perry involved tanks that leaked or overflowed onto the concrete floor. Prior to the first incident, Perry

> constructed a cinder block "berm" at the north and south ends of the plating room facility in order to contain any sewage backup or to otherwise protect both the offices ... and areas of the premises outside the facility ... from any overflow *in the event of a release from any of the tank equipment. Thus, the berm and the slanted flooring were designed to act as*

a holding pond in the event any tanks should release their contents within the plating room's floor space and until such liquids found their way into the drain system and sewer pipe.

Perry Decl. ¶ 10. When each of the three incidents occurred, the chemicals involved were contained by the berm and directed into the drainage system. Perry Decl. ¶ 11. Perry's statements indicate that large leaks or spills, although not intended, were certainly not "unexpected." The plating facility was designed by Perry to accommodate just what he expected: infrequent incidents in which large amounts of toxic liquid would be released from a tank onto the floor of the facility. Because both facets of the word "accidental"-- "unintended" and "unexpected"--must be applied, Shell Oil, 12 Cal.App.4th at 755, 15 Cal.Rptr.2d 815, the court finds that the spills were not accidental because they were not unexpected.

Second, there is no evidence that these incidents, even if "sudden and accidental," caused the soil contamination. The pollution exclusion provides that "property damage arising out of the discharge, dispersal, release or escape of ... contaminants or pollutants" is not covered unless "such discharge, dispersal, release or escape is sudden and accidental." Under this plain language, the property damage must be caused by a "sudden and accidental" "discharge, dispersal, release or escape" of "contaminants or pollutants."

It is not disputed that toxic liquids from the plating process caused the soil contamination. LaBour asserts that there is a triable issue as to whether the three incidents identified by Perry were the specific sources of the contamination. LaBour, however, adduces no evidence that these incidents--as opposed to the commonplace splashing,

spilling, and dripping of toxic liquid onto the concrete floor--caused the contamination. LaBour points out that the precise time at which the integrity of the concrete floor was compromised is not established; [6] thus the concrete could have just as likely degraded after the 1981, 1984, and 1985 incidents as before those incidents. If so, the three large spills would have been contained and drained into the city sewage system without contaminating the soil beneath the concrete.

Third, even if the incidents did cause some soil contamination, they only contributed to contamination caused by pollution occurring in the regular course of the plating operation. It is not disputed that the ordinary splashing, spilling, and dripping of chemicals during the plating process occurred for years both before and after the three incidents. Therefore, no matter when the drainage system and floor degraded enough to allow toxic liquid to reach the soil below, contamination was occurring during the regular course of the facility's operation.

In Smith v. Hughes Aircraft Co., 22 F.3d 1432 (9th Cir.1993), the insured regularly discharged some amount of a toxic chemical into unlined, outdoor ponds. The evidence showed that the insured "encountered periodic episodes where the waste treatment plant broke down or was over-capacitated." [7] During these episodes, toxic chemicals were dumped directly into the ponds. 22 F.3d at 1438. The

---

[6] See Yun Decl. P 2, submitted by LaBour in opposition to summary judgment.

[7] Smith v. Hughes Aircraft Co., 783 F.Supp. 1222, 1232 n. 14 (D.Ariz.1991).

insured argued that these "sudden" events partially caused the injuries suffered by the claimants. Both the district court and the court of appeals rejected the insured's argument that the "sudden and accidental" exception applied. The court of appeals accepted the district court's refusal to "break down [the insured's] long-term waste practices into temporal components in order to find coverage where the evidence unequivocally demonstrates that the pollution was gradual." *Id.*

Legally, the instant case is not distinguishable. At some point in time the concrete floor and drainage system of the plating facility degraded to the point where toxic liquids were able to penetrate into the soil below. SPI's "long-term waste practice" was to permit toxic liquids to drip, splash, and spill onto the floor and flow into the drain. On three occasions, large quantities of toxic liquid spilled onto the floor and flowed down the drain. By the design of the plating facility, it was SPI's "waste practice" to contain both large spills and drips, splashes, and small spills on the concrete floor, to direct them down the drain, and to send them into the city sewer system. Under Smith, the court may not break these practices "into temporal components in order to find coverage."

On summary judgment, the moving party has the initial burden to "show that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91L.Ed.2d 265 (1986). There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* (emphasis

in original). If the moving party meets this burden, the burden shifts to the non-moving party "who must present significant probative evidence tending to support its claim or defense." Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir.1987). The non-moving party's burden is to "set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.' " T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987) (quoting Fed.R.Civ.P. 56(e)) (emphasis added in opinion). Summary judgment is appropriate if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

ASI carried its burden under Rule 56(c) by pointing out that there is no evidence that the soil contamination was caused by a sudden and accidental pollution event. LaBour, who bears the ultimate burden of proving that the "sudden and accidental" exception to the pollution exclusion applies, Aeroquip, 26 F.3d at 895, did not meet his burden under Rule 56(e). Instead of providing the court with significant probative evidence that the three spills identified by Perry were accidental and were the direct cause of the soil contamination discovered by CAL-EPA, LaBour poses a number of unanswered questions:

> [W]hat caused the compromise of the concrete floor and when? Was the concrete floor compromised as a result of the heavy concentration of toxic chemicals released as a result of one or more of the three "sudden and accidental events?" Or, at the time of the event in question, had the concrete floor already been compromised as a result of the small amounts of toxins

> landing on the floor as a result of activities prior to that particular event in question? Was the concrete floor compromised as a result of the first event? The second? The third? When? How?

Def's Mem. Opp. at 9. In opposing summary judgment, however, LaBour "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356. A "series of insinuating questions," which "resemble tenuous speculations rather than potentially valid conclusions that could be grounded in evidence in the record," is insufficient to defeat a motion for summary judgment. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558-59 (9th Cir.1991). *See also* Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir.1988) (per curiam) ("A claim that further discovery or a trial might reveal facts which [the non-moving party] is currently unaware of is insufficient to defeat the motion.").

LaBour's unanswered questions reveal that, even after all discovery has been completed,[8] he cannot produce evidence that the soil contamination was caused by a "sudden and accidental" pollution event. Accordingly, the court finds that there are no genuine issue of material fact for trial and ASI is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that ASI's motion for summary judgment be, and the same is, hereby GRANTED.

---

[8] All discovery, with the limited exception of LaBour's deposition, was cut-off on August 1, 1994. See Stipulation and Order (lodged Aug. 10, 1994); Order (filed Oct. 5, 1993).

Supreme Court, U.S.
FILED
APR 25 1997
CLERK

No. 96-1609

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARTHUR A. LABOUR,

Petitioner,

vs.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEIL H. SELMAN
Counsel of Record
MURRAY M. SINCLAIR
SELMAN • BREITMAN
11766 Wilshire Boulevard, 6th Floor
Los Angeles, California 90025
(310) 445-0800

Attorneys for Respondent
AMERICAN STATES INSURANCE COMPANY

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

QUESTIONS PRESENTED

1. Should this Court grant certiorari where the only issue is whether the Court of Appeals correctly applied state law in its consideration of an insurance coverage dispute?

2. Should this Court grant certiorari where the decision of the Court of Appeals is consistent with its prior decisions interpreting California law and has neither departed from the accepted and usual course of judicial proceedings nor sanctioned such a departure by a lower court?

3. Is a significant issue of public policy involved so as to justify the granting of certiorari where the question involves the interpretation of an insurance contract under state law?

STATEMENT PURSUANT TO RULE 29.6

Respondent American States Insurance Company is a wholly-owned subsidiary of Lincoln National Corporation. American States Insurance Company has no subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . *i*

STATEMENT PURSUANT TO RULE 29.6 . . . . . *ii*

TABLE OF CONTENTS . . . . . *iii*

TABLE OF AUTHORITIES . . . . . *v*

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

COUNTERSTATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Proceedings And Disposition Below . . 3

1. The District Court 3

2. The Court of Appeals 6

3. The Petition for Rehearing 7

4. The Petition for Writ of Certiorari 7

REASONS WHY THE PETITION SHOULD BE DENIED 7

Page

I. GRANTING CERTIORARI WOULD BE IMPROVIDENT UNDER RULE 10 OF THIS COURT WHERE THE ONLY ISSUE IS WHETHER THE COURT OF APPEALS CORRECTLY APPLIED STATE COMMON LAW IN ITS CONSIDERATION OF AN INSURANCE COVERAGE DISPUTE 7

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH ITS PRIOR DECISIONS INTERPRETING CALIFORNIA LAW AND HAS NEITHER DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR SANCTIONED A DEPARTURE BY A LOWER COURT 10

III. THE PETITION INVOLVES THE INTERPRETATION OF AN INSURANCE CONTRACT UNDER STATE LAW AND THUS DOES NOT PRESENT A SIGNIFICANT ISSUE OF PUBLIC POLICY WHICH WOULD JUSTIFY GRANTING CERTIORARI 13

CONCLUSION 17

APPENDIX A A-1

TABLE OF AUTHORITIES

Cases Page

ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773, 22 Cal.Rptr.2d 206 (1993) 11

Adams v. Robertson, 117 S.Ct. 1028 (1997) 9, 15

Aeroquip Corp. v. Aetna Casualty & Surety Co., Inc., 26 F.3d 893 (9th Cir. 1994) 16

American States Ins. Co. v. Sacramento Plating, Inc., 861 F.Supp. 964 (E.D. Cal. 1994) 11, 13

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976) 15

Borden, Inc. v. Affiliated Ins. Co., 682 F.Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 493 U.S. 817 (1989) 14

Braxton v. U.S., 500 U.S. 344, 347, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) . . . 8

Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992) 13

Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986) 12, 13

City of Edgerton v. General Casualty Co., 184 Wis.2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 115 S.Ct. 1360 (1995) 14

Cases Page

Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988) 14
FL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir.), *cert. denied*, 498 U.S. 911 (1990) 14
Harrow Products, Inc. v. Liberty Mutual Ins. Co. (W.D. Mich. 1993) 833 F.Supp. 1239, *aff'd.* in part (6th Cir. 1995) 64 F.3d 1015, 1020 17
Hartford Accident & Indem Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484 (10th Cir.), *cert. denied* 13
Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), *cert. denied*, 113 S. Ct. 1585 (1993) 14
Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 9
Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) 14
Interex Corp. v. Atlantic Mutual Ins. Co., 874 F.Supp. 1406 (D.Mass. 1995) 16
James v. Otis Elevator Co., 854 F.2d 429 (11th Cir. 1989) 12
Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) 14

Cases

Page

Lumbermens Mut. Casualty Co. v. Bellville, Indus., Inc., 938 F.2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992) 13

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting) 9

Maryland Casualty Co. v. Armco Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) 14

Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.E.2d 538 (1986) 12, 13

Medina Jimenez v. Almodovar, 650 F.2d 363 (1st Cir. 1981) 15

Montrose v. Superior Court, 6 Cal.4th 287 (1993) 10

Schlake v. Beatrice Production Credit Ass'n, 596 F.2d 278 (8th Cir. 1979) 15

Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 15 Cal.Rptr.2d 815 (1993) 11

Smith v. Hughes Aircraft Co., 22 F.3d 1432 (9th Cir. 1993) 11, 12

Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S.Ct. 1359, 1362, 128 L.Ed.2d 33 (1994) 15

Tonka Corp. v. Bituminous Casualty Corp., 9 F.3d 51 (8th Cir. 1993), *cert. denied* 13

Cases Page

Truck Ins. Exchange v. Pozzuoli,
17 Cal.App.4th 856, 21 Cal.Rptr.2d
650 (1993) 11
United States v. Diebold, Inc.,
369 U.S. 654, 82 S.Ct. 993 (1962) 10
Upjohn Co. v. Aetna Casualty & Surety Co.,
850 F.Supp. 1342 (W.D. Mich. 1993) 16
Webb v. Webb,
451 U.S. 493, 101 S.Ct. 1889,
1891-1892, 1894, 68 L.Ed.2d
392 (1981) 14

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 2
28 U.S.C. § 2201 3
Fed.R.Civ.P. Rule 56 12
Fed.R.Civ.P. Rule 56(c) 5
Fed.R.Civ.P. Rule 56(e) 5
Sup. Ct. R. 10 . . . . . 2, 7, 8, 9, 17
Sup. Ct. R. 10(a) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1609

ARTHUR A. LABOUR,
Petitioner,

v.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT AMERICAN STATES INSURANCE COMPANY'S BRIEF IN OPPOSITION

Respondent American States Insurance Company ("American States") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

American States concurs with petitioner's asserted basis for jurisdiction pursuant to 28 U.S.C. § 1254(1). However, pursuant to Rule 10 of the Rules of the Supreme Court, American States contends this court is without jurisdiction to entertain this petition because no issue set forth in the petition falls within the parameters of the reasons described in Rule 10 for granting certiorari.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved: 28 U.S.C. § 1332; 28 U.S.C. § 1254(1); Supreme Court Rule 10. The entire text of Supreme Court Rule 10 is reproduced in the Appendix attached hereto.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

On April 5, 1993, American States filed this insurance coverage action governed by California law against two insureds seeking a declaration that it had no obligation to defend or indemnify the insureds under certain comprehensive general liability policies issued by American States for potential or actual liability for clean-up costs resulting from the contamination of soil below a former metal electroplating facility located in Sacramento, California. Insured Arthur A. Labour ("Labour") is the present owner of the property on which the industrial electroplating facility was located. The other insured,

Richard Perry, owned and operated the facility as Sacramento Plating, Inc. ("Sacramento Plating") for a period of 25 years.

Labour sought a defense from American States after the California Environmental Protection Agency Department of Toxic Substances Control ("CAL-EPA") issued an Imminent and Substantial Endangerment Determination and Order ("Order") to Labour on April 22, 1992.

Based on the findings made in the CAL-EPA Order, discovery conducted in the action brought by American States and undisputed evidence developed in the coverage action, it was determined that chemicals were dripped and splashed over the cement floor of the electroplating facility on a day-to-day basis throughout the 25 years that operations were conducted at the facility. In addition, because of the constant dripping and splashing, the facility was specifically designed with a slanted floor, a system of drains and a cinder block "berm" at its north and sound ends to act as a holding pond in the event that any of the chemical tanks overflowed or leaked their contents, in which case any toxic chemicals released would be directed through the drain system and sewer pipes. The three spills described by Labour occurred in the area of the berm just as expected.

B. Proceedings And Disposition Below

1. *The District Court*

Invoking the Court's diversity jurisdiction, American States filed a declaratory judgment action pursuant to 28 U.S.C. § 2201 on April 5, 1993. On

November 5, 1993, Labour filed a motion asking the Court to abstain from exercising jurisdiction over the district court action. After careful consideration of the jurisdictional issue, the district court filed a memorandum and order on February 8, 1994 setting forth various reasons for the conclusion that jurisdiction over American States' declaratory judgment action was appropriate.

On August 15, 1994, American States filed a motion for summary judgment seeking an adjudication that the pollution exclusion in each of the policies it issued to Labour and Perry barred coverage as a matter of law. The pollution exclusion in each American States policy at issue is a "sudden and accidental" pollution exclusion which bars coverage for environmental pollution unless the property damage resulting from such pollution has been caused by the sudden and accidental discharge, dispersal, release or escape of contaminants or pollutants, as specified in the language of the exclusion.

The district court specifically held that there was no evidence that the three spill incidents identified by the insureds -- as opposed to the commonplace splashing, spilling, and dripping of toxic liquid onto the concrete floor -- caused the contamination. Further, even if the three spill incidents did cause some soil contamination, the district court held that the incidents were only part of the contamination caused by pollution occurring in the regular course of plating operations.

In addition, the district court held that the contamination at the Sacramento Plating facility was not "accidental" as also required under the exception to the pollution exclusion. Based upon statements made by

Richard Perry, the operator of Sacramento Plating, and the uncontroverted factual record filed in support of the motion for summary judgment, the district court determined that the leaks or spills which occurred at the facility, although not intended, were certainly not unexpected because the facility was designed to accommodate large spills of toxic liquid onto the floor of the facility.

Finally, the district court decided that American States had carried its burden under Rule 56(c) by pointing out that there was no evidence that the soil contamination was caused by a sudden and accidental pollution event. Because Labour would bear the ultimate burden of proving that the "sudden and accidental" exception to the pollution exclusion applies, the Court held that he had not met his burden under Rule 56(e) of opposing the motion for summary judgment with significant probative evidence tending to support his claim.

Therefore, the district court granted American States' motion for summary judgment.

After American States' motion for summary judgment was granted, Royal Insurance Company ("Royal"), another of Labour's insurers, filed a motion for summary judgment against Labour in the same action after American States filed its motion. Labour consented to entry of summary judgment by the district court because the issues in Royal's motion were identical to the motion of American States.

2. *The Court of Appeals*

After the district court granted the motions for summary judgment of American States and Royal, Labour filed an appeal with the Ninth Circuit Court of Appeals. In the appeal, the Ninth Circuit again considered the jurisdiction issue and concluded that the district court's exercise of discretion to accept jurisdiction was proper. As such, on the jurisdictional issue, the Court of Appeals held that dismissal of the declaratory relief claims would have resulted in piecemeal litigation because the breach of contract claims would still be pending before the district court. In addition, the Ninth Circuit stated that dismissal would frustrate the interests of judicial economy because the district court correctly decided the case on the merits.

Applying California law, the Ninth Circuit concurred with the district court's opinion that the three spill incidents in 1981, 1984 and 1985 did not involve soil contamination caused by an abrupt, unexpected and unintended discharge. The uncontroverted evidence in the record indicated that the spills were not unexpected, and that such spills occurred in the context of daily drippings and spills of toxic liquids onto the floor over many years. Consequently, the Ninth Circuit rejected Labour's effort to break down long-term business practices into temporal components in order to artificially attempt to trigger insurance coverage when the evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time.

Therefore, the Ninth Circuit concluded that the district court properly entered summary judgment in favor of American States and Royal, and that Labour's proffered evidence of the three tank spills did not raise a triable issue

of fact regarding coverage under any American States or Royal policy. The district court judgment was affirmed pursuant to a memorandum opinion filed on October 25, 1996.

3. *The Petition for Rehearing*

On or about November 7, 1996, Labour filed a petition for rehearing setting forth issues essentially identical to the questions presented in Labour's petition for writ of certiorari.

By order filed on December 4, 1996, the Ninth Circuit denied the petition for rehearing.

4. *The Petition for Writ of Certiorari*

Labour filed his petition for a writ of certiorari with this Court on March 4, 1997.

REASONS WHY THE PETITION SHOULD BE DENIED

I. GRANTING CERTIORARI WOULD BE IMPROVIDENT UNDER RULE 10 OF THIS COURT WHERE THE ONLY ISSUE IS WHETHER THE COURT OF APPEALS CORRECTLY APPLIED STATE COMMON LAW IN ITS CONSIDERATION OF AN INSURANCE COVERAGE DISPUTE

Where certiorari has been granted, the rationale behind granting a writ of certiorari has been stated by this court as follows:

> "A principal purpose for which we use our certiorari jurisdiction, and the reason we grant certiorari in the present case, is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991).

As set forth in Supreme Court Rule 10, there are only two reasons the court may consider in granting review under writ of certiorari which do not concern a federal question or federal law, and neither of these non-federal considerations governing review on certiorari are applicable to Labour's petition for writ of certiorari.

The first non-federal question issue concerns a situation where a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. (Rule 10(a)). The second non-federal issue concerns a situation where a United States Court of Appeals has so far departed from the accepted usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power. (Rule 10(a)).

The second issue under Rule 10(a) concerning the Court of Appeals' alleged departure from the accepted and usual course of judicial proceedings will be dealt with below. As to the first non-federal issue in Rule 10(a), Labour has made no attempt to argue that the Ninth Circuit entered a decision in conflict with a decision

of another United States Court of Appeals on the same issue. Instead, Labour expressly argues that the Ninth Circuit made erroneous factual findings and misapplied or failed to follow California substantive law on the "sudden and accidental" pollution exclusion. Labour Petition at 4.

The last part of Rule 10 reads as follows:

> "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Even where an issue may seem to be important, where the question does not fall within the parameters of the Court's traditional discretion in granting review, the Court has "recognize[d] that by 'adher[ing] scrupulously to the customary limitations on our discretion' regardless of the significance of the underlying issue, 'we "promote respect . . . for the Court's adjudicatory process.'"" *Adams v. Robertson*, 117 S.Ct. 1028, 1032, n. 6 (1997), quoting *Illinois v. Gates*, 462 U.S. 213, 224, 103 S.Ct. 2317, 2325, 76 L.Ed.2d 527 (1983) (quoting *Mapp v. Ohio*, 367 U.S. 643, 677, 81 S.Ct. 1684, 1704, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting))

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH ITS PRIOR DECISIONS INTERPRETING CALIFORNIA LAW AND HAS NEITHER DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR SANCTIONED A DEPARTURE BY A LOWER COURT

Labour asks this Court to grant certiorari because the Court of Appeals allegedly entered a decision that conflicts with a decision of the California Supreme Court and also failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced under *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993 (1962). Consequently, according to Labour, because the courts below allegedly failed to follow established California law, the Court of Appeals has purportedly departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the district court as to call for the exercise of this court's supervisory power.

On a threshold level, Labour errs in his assertion that the California Supreme Court's decision in *Montrose v. Superior Court*, 6 Cal.4th 287 (1993) is a pollution exclusion case. Although the critical language cited by Labour appears similar to the language that might describe a court's analysis of the pollution exclusion, the *Montrose* court was analyzing the issue of whether the environmental contamination caused by Montrose's actions constituted an "occurrence" within the meaning of the comprehensive general liability policies at issue in that case.

There is no California Supreme Court authority which exists on the interpretation of the "sudden and accidental pollution exclusion."

As to Labour's contention that federal courts of appeal will follow state appellate court decisions absent compelling evidence that the state's supreme court would decide differently, that is exactly what the Ninth Circuit did in this case. A quick review of the district court and Ninth Circuit decisions will reveal that numerous appellate authorities exist in California to support the proposition that the "sudden and accidental pollution exclusion unambiguously bars coverage for long-term gradual pollution." *See, American States Ins. Co. v. Sacramento Plating, Inc.*, 861 F.Supp. 964, 970 (E.D. Cal. 1994), citing *Truck Ins. Exchange v. Pozzuoli*, 17 Cal.App.4th 856, 860, 21 Cal.Rptr.2d 650 (1993), *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 752-56, 15 Cal.Rptr.2d 815 (1993) and *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.*, 17 Cal.App.4th 1773, 1787, 22 Cal.Rptr.2d 206 (1993).

The Ninth Circuit decision in this case is also consistent with prior decisions of the same court, particularly *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432 (9th Cir. 1993).

Labour attempts to discredit *Smith v. Hughes* by making the creative but misleading argument that the proffered alleged sudden and accidental events in *Smith v. Hughes* were not entitled to be considered because they were "periodic episodes" as described in the district court decision. However, in the Ninth Circuit's decision, the

events are referred to as "certain 'sudden' polluting events . . ." 22 F.2d at 1438.

Consequently, Labour is missing the simple lesson of the case which stands for the proposition that an insured should not be allowed to artificially "break down its long-term waste practices into temporal components in order to find coverage where the evidence unequivocally demonstrates that the pollution was gradual." *Smith v. Hughes* at 1438.

Labor's assertion that the Ninth Circuit failed to afford him the benefit of all reasonable and logical inferences also misses the mark under the huge body of jurisprudence that has developed over recent years concerning the summary judgment burden under Rule 56 of the Federal Rules of Civil Procedure. Now, once the moving party has met its burden on a motion for summary judgment under the standard articulated by *Celotex v. Catrett*, 477 U.S. at 324, 106 S.Ct. 2548, 2553 (1986), in order to defeat a motion for summary judgment, the non-moving party who bears the burden of proof on a particular issue must affirmatively demonstrate a genuine issue of material fact by pointing out specific facts that, if proven at trial, would meet its burden of proof on that issue. If the opposing party presents only circumstantial evidence, inferences arising from that evidence must be sufficient to sustain a verdict at trial. If the inferences are insufficient to sustain a verdict based on circumstantial evidence, and no other evidence is presented, summary judgment is proper. *James v. Otis Elevator Co.*, 854 F.2d 429, 432, n. 3 (11th Cir. 1989). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*

Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.E.2d 538 (1986). Under the *Celotex* standard, the non-moving party has the burden to go beyond the pleadings to designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

The district court granted summary judgment, and the Ninth Circuit affirmed that judgment, because Labour's evidence was speculative and conjectural concerning the possible soil contamination caused by the three spill incidents. *American States Ins. Co. v. Sacramento Plating*, 861 F.Supp. 964, 972.

III. THE PETITION INVOLVES THE INTERPRETATION OF AN INSURANCE CONTRACT UNDER STATE LAW AND THUS DOES NOT PRESENT A SIGNIFICANT ISSUE OF PUBLIC POLICY WHICH WOULD JUSTIFY GRANTING CERTIORARI

In recent years, numerous litigants have sought review by this Court of state common law insurance coverage cases. The court has uniformly denied certiorari.[1/]

[1/] *See, e.g., Tonka Corp. v. Bituminous Casualty Corp.*, 9 F.3d 51 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994); *Hartford Accident & Indem Co. v. United States Fidelity & Guar. Co.*, 962 F.2d 1484 (10th Cir.), *cert. denied*, 113 S. Ct. 411 (1992); *Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992); *Lumbermens Mut. Casualty Co. v. Bellville Indus., Inc.*, 938 F.2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 969

Nonetheless, Labour asks this court to examine a substantive state law determination on quasi public policy grounds.

At page 2 of his petition, Labour cites to the Fifth Amendment of the United States Constitution as a "constitutional provision involved" in this case. However, Labour never raised the due process issue to the courts below and has not even incorporated or referenced due process in any one of the three issues he has presented to the Court for its consideration. The parties are required to present federal issues to the courts below in order to preserve the issue for the Court's consideration. For example, where a litigant fails to present a federal issue to the state court of last resort prior to filing a petition for writ of certiorari, that litigant will be precluded from arguing the federal issue before the Supreme Court. *Webb v. Webb,* 451 U.S. 493, 496-497, 501, 101 S.Ct. 1889, 1891-1892, 1894, 68 L.Ed.2d 392 (1981). Requiring parties to raise

---

(1992); *FL Aerospace v. Aetna Casualty & Sur. Co.,* 897 F.2d 214 (6th Cir.), *cert. denied,* 498 U.S. 911 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.,* 842 F.2d 977 (8th Cir.), *cert. denied,* 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco Inc.,* 822 F.2d 1348 (4th Cir. 1987), *cert. denied,* 484 U.S. 1008 (1988); *Borden, Inc. v. Affiliated Ins. Co.,* 682 F.Supp. 927 (S.D. Ohio 1987), *aff'd,* 865 F.2d 1267 (6th Cir.), *cert. denied,* 493 U.S. 817 (1989); *Keene Corp. v. Insurance Co. of N. Am.,* 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations,* 633 F.2d 1212 (6th Cir. 1980), *cert. denied,* 454 U.S. 1109 (1981); *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.,* 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), *cert. denied,* 113 S. Ct. 1585 (1993); *City of Edgerton v. General Casualty Co.,* 184 Wis.2d 750, 517 N.W.2d 463 (1994), *cert. denied,* 115 S.Ct. 1360 (1995).

issues below not only avoids unnecessary adjudication in the Supreme Court by allowing state courts to resolve issues on state law grounds, but also assists the court in its "deliberations by promoting the creation of an adequate factual and legal record." *Adams v. Robertson,* 117 S.Ct. 1028, 1031 (1997). Thus, it would be improvident to grant the petition for certiorari on due process grounds, to the extent that a simple breach of contract could ever constitute a due process violation. *Schlake v. Beatrice Production Credit Ass'n,* 596 F.2d 278, 281 (8th Cir. 1979); *Medina Jimenez v. Almodovar,* 650 F.2d 363, 370 (1st Cir. 1981) ("[A] mere breach of a contractual right is not a deprivation of property without *constitutional* due process of law."); *Bishop v. Wood,* 426 U.S. 341, 349-50, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976).

Labour has made other quasi-public policy arguments concerning the impact that this case may have on other insureds. However, because each insurance coverage dispute is peculiar to its insureds, the policy at issue, the facts of the particular claim, and the application of state law to the policy language and claim facts, the Court would have to wildly speculate to determine how the decision will affect other insureds.

Even where an underlying issue is of significance or of great practical importance to a petitioner, where the issue does not fit within the customary limitations on the court's discretion, the court will ordinarily not consider significance or importance alone as a "sufficient reason" for granting certiorari. *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 114 S.Ct. 1359, 1362, 128 L.Ed.2d 33 (1994).

Ironically, public policy actually supports the reasoning of the Court of Appeals which, in imposing upon the insured the burden of proving a claim is covered under the "sudden and accidental" exception to the pollution exclusion, consistent with its prior holding in *Aeroquip Corp. v. Aetna Casualty & Surety Co., Inc.*, 26 F.3d 893, 894-95 (9th Cir. 1994), articulated a clear sensible approach to determining whether a comprehensive general liability policy affords coverage for a pollution claim.

A number of public policy reasons support the "majority of decisions [which] place the burden on the insured" to prove the exception. *Aeroquip*, 26 F.3d at 894; *Interex Corp. v. Atlantic Mutual Ins. Co.* (D.Mass. 1995) 874 F.Supp. 1406, 1416 ("[T]he majority of state courts now place the burden on the insured as to the 'sudden and accidental' exception from the pollution exclusion.") First, as noted by the Ninth Circuit in *Aeroquip*, applying California law, "if the burden were on the insurer, the property owner would have an incentive to avoid finding out whether pollutants are being gradually discharged because preservation of ignorance would increase the likelihood of insurance coverage." (at 895)

Second, as noted by the United States District Court for the Western District of Michigan, "[p]lacing the burden on the insurer of proving that the exception to the exclusion does not apply, would in effect force the insurer to monitor the insureds' activities . . . to protect itself from liability. This allocation of the burden by the Court would in effect rewrite the contractual relationship between the parties." *Upjohn Co. v. Aetna Casualty & Surety Co.* (W.D. Mich. 1993) 850 F.Supp. 1342, 1346.

Third, because application of the sudden and accidental exception is typically "dependent upon evidence that an unusual event occurred during the course of [the insured's] operations—evidence that [the insured] is more likely to possess or have access to—fairness dictates that [the insured] be made to bear the burden of proof." *Harrow Products, Inc. v. Liberty Mutual Ins. Co.* (W.D. Mich. 1993) 833 F.Supp. 1239, 1244, *aff'd.* in part (6th Cir. 1995) 64 F.3d 1015, 1020 (". . . [I]t would be strange to force a party to prove a negative, that the spills were *not* all sudden and accidental. This is particularly true where the [insured] is the party most likely to have the relevant information about its operations.")

Therefore, the Ninth Circuit's reasoning and analysis concerning the pollution exclusion is actually supportive of public policy and is not contrary to such concerns. Thus, not only does this case concern the interpretation of an insurance contract under state law, but the decision of the Court of Appeals advances public policy concerns.

CONCLUSION

As set forth above, the petition for writ of certiorari should be denied for three reasons:

(1) Because granting certiorari would be improvident under Supreme Court Rule 10 where the only issue is whether the Court of Appeals correctly applied state common law;

(2) Because the decision of the Court of Appeals is consistent with its prior decisions interpreting California law and has neither departed from the accepted and usual course of judicial proceedings nor sanctioned a departure from a lower court; and

(3) Because the petition involves the interpretation of an insurance contract under state law and thus does not present a significant issue of public policy which would justify granting certiorari.

Therefore, for all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

NEIL H. SELMAN*
MURRAY M. SINCLAIR
SELMAN · BREITMAN
11766 Wilshire Blvd., 6th Floor
Los Angeles, California 90025
(310) 445-0800
Attorneys for Respondent
AMERICAN STATES INSURANCE COMPANY

* Counsel of Record

APPENDIX A

APPENDIX

RELEVANT STATUTORY PROVISIONS INVOLVED

Supreme Court Rule 10:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled

> by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court, U.S.
FILED
MAY 7 1997
OFFICE OF THE CLERK

No. 961609

In The

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR A. LABOUR
Petitioner,
v.
AMERICAN STATES INSURANCE COMPANY
AND ROYAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK G. BONINO
Counsel of Record
ROPERS, MAJESKI, KOHN & BENTLEY
1001 Marshall Street
Redwood City, California 94063
(415) 364-8200

Attorneys for Respondent
Royal Insurance Company

BOWNE OF SAN FRANCISCO, INC., 343 SANSOME ST., S.F., CA 94104 (415) 362-2300

33 pp

QUESTIONS PRESENTED

1. Did the District Court and the Court of Appeals properly apply California law by following numerous California law cases which have held the pollution exclusion in a general liability insurance policy excludes coverage for gradual and expected pollution discharged as part of the normal business operations of the insured?

2. Was the Court of Appeals correct in affirming the District Court's entry of summary judgment in Respondent's favor after finding there was no coverage because the undisputed evidence established that the daily discharges of chemical waste by Petitioner was an admittedly expected part of normal business operations and thus excluded under the pollution exclusion of the policy?

OPINIONS BELOW

The decision of the District Court is reported as *American States Insurance Company v. Sacramento Plating, Inc.*, 861 F.Supp. 964. The decision of the Court of Appeals was issued on a "Not For Publication" basis.

NO CONSTITUTIONAL PROVISION INVOLVED

The petition for writ of certiorari does not raise any constitutional issues. There has been a full trial on the merits in the District Court, thus, there has been no violation of Petitioner's right to substantive or procedural due process.

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED	i
OPINIONS BELOW	ii
NO CONSTITUTIONAL PROVISION INVOLVED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. INTRODUCTION	1
II. NO VALID GROUNDS EXIST FOR GRANTING PETITIONER'S WRIT OF CERTIORARI	3
III. THE DISTRICT COURT AND COURT OF APPEALS' DECISIONS FOLLOWED ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS	4
A. The District Court And The Court of Appeals Properly Applied California Law	4
B. The Court of Appeals' Decision is Consistent With Other Relevant Ninth Circuit Decisions	8
C. The Court of Appeals' Decision is Consistent With Other Federal Court Decisions	9
D. Petitioner Failed To Oppose The Motion For Summary Judgment For Which Petitioner Seeks Relief	10
REASONS WHY THE WRIT SHOULD BE DENIED	11
CONCLUSION	12
APPENDIX	A-1

TABLE OF AUTHORITIES

Federal Cases

	Page
A. Johnson & Co., Inc. v. Aetna Cas. & Surety Company, 933 F.2d 66 (1st Cir. 1991)	9
Aeroquip Corporation v. Aetna Casualty and Surety Co., 26 F.3d 893, 894 (9th Cir. 1994)	8
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986) 106 S.Ct. 2505	4
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	5
Christian Science v. City and County of San Francisco, 794 F.2d 1010 (9th Cir. 1986)	10
Cincinnati Insurance v. Flanders Electric Motor Service, 40 F.3d 146, 154 (7th Cir. 1994)	9
Clapp v. C.I.R., 875 F.2d 1396 (9th Cir. 1989)	10
Intel Corp. v. Hartford Accident and Indemnity Co., 952 F.2d 1551 (9th Cir. 1991)	5
Jones v. Union Pacific R. Co., 968 F.2d 937 (9th Cir. 1992)	4
Komatsu, Ltd. v. States S.S. Co., 674 F.2d 806 (9th Cir. 1982)	10
Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 938 F.2d 1423 (1st Cir. 1991), cert. den., 1992, 112 S.Ct. 969	9
Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994)	10
Ray Industries, Inc. v. Liberty Mutual Insurance Co., 974 F.2d 754 (6th Cir. 1992)	9
Smith v. Hughes Aircraft, 22 F.3d 1432, 1437-1438 (9th Cir. 1993)	6, 8
Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994)	3
United States v. Bechtel Corp., 648 F.2d 660 (9th Cir. 1981)	11
United States v. Diebold, Inc., 369 U.S. 654 (1962)	4

TABLE OF AUTHORITIES

State Cases

	Page
ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773 (1993)	6, 7
Aydin v. First State, Cal.App.4th (Filed April 21, 1997)	7
Montrose Chemical Corp. v. Superior Court, 6 Cal.4th 287 (1993)	7
Royal v. Whittaker, 181 Cal.3d 532 (1986)	7
Service Control Corp. v. Liberty Mutual Insurance Co., 46 Cal.App.4th 1047 (1996)	4, 5
Shell Oil Company v. Winterthur Swiss Ins. Co. 12 Cal.App.4th 715 (1993)	5, 6
Vann v. Travelers Companies, 39 Cal.App.4th 617 (1995)	7

Statutes

Federal Appellate Practice Ninth Circuit (1994) Section 5.2, 5-35, Lawyers Cooperative Publishing	10
Federal Rules of Civil Procedure, Rule 56(c)	5

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR A. LABOUR
Petitioner,
v.
AMERICAN STATES INSURANCE COMPANY
AND ROYAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Royal Insurance Company hereby respectfully prays that the petition for writ of certiorari be denied for the reasons set forth herein.

STATEMENT OF THE CASE

I.

INTRODUCTION

This is an insurance coverage dispute arising from environmental contamination that occurred gradually and incrementally over a twenty-five year period at a Sacramento electroplating facility. Petitioner, who admitted spilling toxic chemicals on a regular basis, sought insurance coverage from Respondent Royal and from another insurer for environmental cleanup costs mandated by the State of California.

Respondent moved for summary judgment on the grounds that the pollution exclusion contained in its liability policy precluded coverage as a matter of law. Co-Respondent American States had previously moved successfully for summary judgment on similar grounds, Petitioner, therefore, filed a Statement of Non-Opposition to the Motion for Summary Judgment, stating as follows:

> "Without conceding the merit of Royal Insurance Company's Motion for Summary Judgment, defendant and counterclaimant Arthur A. Labour hereby indicates his lack of opposition to the court's granting of Royal Insurance Company's motion." (Appendix p. A-1-2)[1/]

Noting Petitioner's Statement of Non-Opposition, the District Court properly granted Respondent's Motion for Summary Judgment holding that the policy's pollution exclusion precluded coverage as a matter of law. (A-6.)

The Royal policy specifically excludes coverage for pollution unless the initial discharge of pollutants is "sudden and accidental." The undisputed and unopposed evidence, some of it submitted by Petitioner, demonstrated that pollutants causing contamination were discharged at the site gradually and incrementally in the course of normal business operations over a twenty-five year period and, thus, were neither sudden nor accidental. Therefore, summary judgment is properly entered by the District Court and affirmed by the Court of Appeals.

Contrary to plaintiff's assertions, evidence of three specific chemical tank leaks did not create any genuine issues of material fact. Two of the three incidents first occurred *after* cancellation of the Royal policy at issue. The District Court's finding that the undisputed evidence showed that each of the three chemical tank leaks and overflows were expected to occur in the normal course of business operations and, therefore, were neither sudden nor accidental, is consistent with existing California and federal law. Petitioner has set forth no grounds regarding this state substantive

---

[1/]All references to "Appendix" will hereinafter be referred to as "A-*n*."

law issue to justify the granting of its Petition for Writ of Certiorari and, therefore, his Petition should be denied.

II.

NO VALID GROUNDS EXIST FOR GRANTING PETITIONER'S WRIT OF CERTIORARI

Petitioner has failed to acknowledge that grant of writ of certiorari under Rule 10 is not a matter of right but one of judicial discretion. Thus, unless one of the factors required in granting certiorari is present, review by the Supreme Court should be denied. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). None of the factors which allow the granting of certiorari are present here.

The following factors are to be considered in deciding whether to grant certiorari: (1) whether a conflict exists between the decisions of two Courts of Appeals; (2) whether a conflict exists between a Court of Appeals decision and a decision by a state's highest court; (3) whether a Court of Appeal has drastically departed from the accepted and usual course of judicial proceeding; (4) whether the state court of last resort has decided a federal question in conflict with another state court of last resort; (5) whether a Court of Appeals decision conflicts with a Supreme Court decision; (6) whether a decision involves an important federal question that should be settled by the Supreme Court. (Supreme Court Rule 10.) Petitioner has failed to satisfy even one of these grounds for the granting of certiorari under Rule 10.

The Court of Appeals decision in the instant case is not published, so there is presently no conflicting authority with another Court of Appeals decision; thus, factor one is inapplicable. Factor two is inapplicable because the Supreme Court of California has not yet decided the issues within this case. Contrary to Petitioner's assertions, here the Court of Appeals did not drastically depart from accepted and usual course of judicial proceedings because the Court of Appeal properly applied California law. Thus, factor three is absent. Factor four is likewise missing because no federal question is involved. Additionally, a

right to a writ of certiorari does not exist here because the Court of Appeals decision in the underlying case does not conflict with the Supreme Court case *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), because Petitioner has been "afforded the benefit of all reasonable and logical inferences from the facts adduced" when the Ninth Circuit addressed this case on the merits; making factor five irrelevant in this case. Finally, as set forth above, no federal question exists, and thus, factor six is clearly inapplicable. For the reasons set forth herein, the Court of Appeals applied the correct standard in determining whether a motion for summary judgment granted by the District Court should be affirmed. Thus, Petitioner's petition for writ of certiorari should be denied.

III.

THE DISTRICT COURT AND COURT OF APPEALS' DECISIONS FOLLOWED ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The granting of summary judgment in favor of Respondent was consistent with due process, the Federal Rules and California case law.

A. The District Court And The Court of Appeals Properly Applied California Law

Contrary to Petitioner's assertions, the District Court and the Court of Appeals properly applied California law. In considering the summary judgment motion, the Court of Appeals reviews the record in the light most favorable to the non-moving party, to determine whether there exists genuine issues of material fact exist. *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992). To avoid summary judgment, the opposing party must present affirmative evidence on matters on which it has the burden of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). California has held that the insured bears the initial burden of proving its release or discharge of pollutants was "sudden and accidental." *Service Control Corp. v. Liberty Mutual Insurance Co.*, 46 Cal.App.4th 1047 (1996). Thus,

although the non-moving party is to afforded the benefit of all reasonable and logical inferences from the facts adduced, he must present affirmative evidence on matters on which he has the burden of proof at trial.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Fed. Rules of Civ. Proc., Rule 56(c). Once that burden is met "'the burden shifts to the opposing party *who must present significant probative evidence* tending to support its claim or defense.' [Citation.]" *Intel Corp. v. Hartford Accident and Indemnity Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991); Fed. Rules of Civ. Proc., Rule 56(e).

Here, the District Court properly granted summary judgment because Petitioner failed to present any affirmative evidence at trial to avoid summary judgment. Respondent established the absence of any genuine issue of material fact and entitlement to judgment as a matter of law by presenting undisputed evidence that contamination took place *gradually and incrementally* over time as the result of *normal business operations*, and therefore, fell within the policy's pollution exclusion.

The pollution exclusion in the Royal policy at issue excludes coverage for damages "arising out of discharge, dispersal, release or escape" of pollutants unless "such discharge, dispersal, release or escape is sudden and accidental."

Under California law, the foregoing exclusion is clear and unambiguous. *Shell Oil Company v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 755. In *Shell Oil*, the California Court held acts that are *expected to occur* are *not accidental:*

> "An 'accidental' event is both unintended and unexpected; omitting either leaves an important part of the word's meaning unexpressed. A 'discharge, dispersal, release or escape' of pollutants that is expected is not accidental, regardless of whether it was not intended." *Shell Oil, supra,* 12 Cal.App.4th at 755.

The undisputed evidence demonstrated that each of the three specific incidents of pollution challenged by Petitioner on appeal *"arose from the general business hazards which [were] expected to occur in Sacramento Plating Inc.'s operation of the Site"* and *"were a normal part of the business at the Site throughout the time it was . . . operated as Sacramento Plating."* (A-12.)

For there to be coverage *"the release* must be *both* 'sudden and accidental.'" *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* 7 Cal.App.4th 1773, 1785 (1993) [emphasis added]. In *ACL Technologies* the California Court of Appeal held:

> "Giving 'sudden' a meaning independent of 'accidental' . . . requires giving it a meaning with a temporal aspect — immediacy, quickness, or abruptness — that does not allow it to cover events, such as happened in this case — that occurred gradually. We therefore conclude . . . that 'sudden and accidental' unambiguously does not include gradual pollution." *ACL Technologies, supra*, 17 Cal.App.4th. at 1787.

It is well settled California law that the exclusion at issue precludes coverage for *gradual* pollution. *Shell, supra*, 12 Cal.App.4th at 754; *ACL Technologies, supra*, 17 Cal.App.4th at 1787. "'Sudden' conveys the sense of an unexpected event that is *abrupt* or *immediate* in nature." *Shell, supra*, 12 Cal.App.4th at 755. "Accordingly, under California law, the 'sudden and accidental' exception to the pollution exclusion necessarily incorporates a notion of temporal brevity." *Smith v. Hughes Aircraft*, 22 F.3d 1432, 1437-1438 (9th Cir. 1993).

It is undisputed that the tank drained in spring 1981 ". . . as a result of the acid copper liquid's corrosion of the metal bottom of the tank." (A-11.) The evidence showed it was *corrosion* of the metal bottom of the tank *not* failure of the tank's interior liner, that resulted in a "discharge, dispersal, release or escape" of pollutants. Moreover, there was no evidence that the tank's interior liner failed as a result of any sudden and accidental event. Rather, the undisputed evidence showed there were no

explosions, fires, earthquakes or other natural disasters which affected any of the equipment at the site. (A-10.)

> "Under such circumstances, where there is no evidence of any traumatic release during the policy period, and substantial evidence of release from gradual corrosion, it is reasonably obvious that an insurer has carried any burden it might have to show applicability of the pollution exclusion." *ACL Technologies, supra*, 17 Cal.App.4th at 1797.

Therefore, as a matter of law, there can be no coverage arising from this incidence since corrosion is, by definition, a *gradual* process, not a sudden event. *ACL Technologies, supra*, 17 Cal.App.4th at 1795; Webster's Collegiate Dictionary, 10th ed., p. 261.

Contrary to Petitioner's assertions, the opinions of the District Court and the Court of Appeals are not in conflict with the decisions in *Montrose* or *Vann*. In *Montrose Chemical Corp. v. Superior Court* 6 Cal.4th 287 (1993), the court held that a claim must be defended unless "undisputed" facts establish no potential for liability under the policy. Likewise, in *Vann v. Travelers Companies* 39 Cal.App.4th 617 (1995), the court held that a finding of no obligation to defend may be made by summary judgment if there are undisputed facts which demonstrate that there is no potential for coverage.

Moreover, coverage, under the Royal policy, is limited to bodily injury or property damage which occurs *during the policy period.* The Royal policy at issue was in effect from March 23, 1982 through *March 23, 1984.* The tank overflow in *June 1984* and the tank leak in *May 1985* could not possibly have resulted in damage *during the policy period* since those events occurred after the end of the policy period. Under California law, the burden is on the insured to establish that the claim falls within the policy coverage. *Royal v. Whittaker* 181 Cal.3d 532, 537 (1986). The California Courts have held this burden requires the insured to prove that the pollution claim is "sudden and accidental". *Aydin v First State ____ Cal.App.4th ____* (Filed April 21, 1997). Here, Petitioner has failed to carry that burden since the undisputed evidence shows that both the daily discharges of chemical waste

and the three chemical tank leaks occurred as an expected part of *normal business operations* at Sacramento Plating. (Perry Declaration, ¶ 12, A-12.)

Petitioner has even acknowledged this in his Petition. (Petition, p. 4.) Because the discharges of chemicals were *expected* to occur in Sacramento Plating's operations, they were neither sudden or accidental and Petitioner produced no evidence to the contrary to the District Court. Thus, these cumulative, incremental discharges of chemicals during the regular business activities were properly deemed by the District Court and the Court of Appeals as neither "sudden" nor "accidental."

B. The Court of Appeals' Decision is Consistent With Other Relevant Ninth Circuit Decisions

The Court of Appeals' Decision is consistent with other relevant Ninth Circuit Decisions. In *Smith v. Hughes Aircraft* 22 F.3d 1432 (9th Cir. 1993), the Ninth Circuit concluded there was no coverage for contamination caused by an insured' long-term business practice of discharging trichloroethylene (TCE) into unlined ponds, because such acts could not be considered "sudden." (*Id.* at 1437.) The Court specifically rejected the insured's contention that certain "sudden" polluting events caused TCE to be dumped directly into the unlined pond. Here, it was shown through undisputed evidence that contamination at the site was caused *gradually* and *incrementally* over a 25-year period by the long-term, daily business practices and operation of Sacramento Plating. Thus, the Ninth Circuit's decision is consistent with its prior holding in *Smith* because likewise here, the evidence also unequivocally demonstrated that the daily chemical spills *and* the three tank leaks were expected to occur in normal business operations, and therefore, were neither "sudden" nor "accidental".

Under California law, as applied by the Ninth Circuit, "the 'sudden and accidental' exception to the pollution exclusion incorporates the notion of temporal brevity." *Aeroquip Corporation v. Aetna Casualty and Surety Co.* 26 F.3d 893, 894 (9th Cir. 1994). In *Aeroquip* the insured had argued, as Petitioner does here, that "sudden" can mean unexpected and

unintended and need not mean anything relating to time, such as abrupt or immediate. *Id.* Petitioner's efforts to break down its long-term waste practices and pollution-prone activities into "temporal components" was properly rejected by the District Court and the Ninth Circuit.

C. The Court of Appeals' Decision is Consistent With Other Federal Court Decisions

Numerous other Federal Courts have held that polluting events that occur in the normal course of business are not "sudden and accidental" within the meaning of the exception to the policy's pollution exclusion. *Cincinnati Insurance v. Flanders Electric Motor Service*, 40 F.3d 146, 154 (7th Cir. 1994); *Ray Industries, Inc. v. Liberty Mutual Insurance Co.*, 974 F.2d 754, 769 (6th Cir. 1992); *A. Johnson & Co., Inc. v. Aetna Cas. & Surety Company*, 933 F.2d 66, 74 (1st Cir. 1991).

These other Federal Court decisions specifically hold events which are expected to occur in the normal course of business at a pollution-prone operation cannot reasonably be considered "sudden and accidental" under similar liability policies at issue in those cases.

For instance, in *Lumbermen's Mutual Casualty Co. v. Belleville Industries, Inc.* 938 F.2d 1423 (1st Cir. 1991), cert. den. 1992 112 S.Ct. 969, a case cited by Petitioner the insured, which discharged PCVs as a result of its business operations, sought to limit its claims to "two allegedly 'sudden and accidental' events": a heavy rainstorm in 1973 and a fire in 1975 in an attempt to avoid the application of the policy's pollution exclusion. *Id.* at 1425. The First Circuit rejected the policyholder's arguments that the pollution exclusion should be applied reasoning that:

> "[F]rom a microanalytical viewpoint, almost any event can be labeled unexpected, since history probably never repeats itself precisely. But such an approach would eviscerate the exclusion for pollution." *Id.* at 1428.

Thus, contrary to Petitioner's assertion, the District Court and the Ninth Circuit opinions are not only consistent with existing California law, but are consistent with other Federal Court

decisions as well. Therefore, neither the District Court or the Ninth Circuit departed from accepted or usual course of judicial proceedings and the petition for writ of certiorari should be denied.

D. Petitioner Failed To Oppose The Motion For Summary Judgment For Which Petitioner Seeks Relief

Petitioner has neglected to inform this Court that he filed a statement of non-opposition to the granting of summary judgment in Respondent's favor. "In order to preserve an issue for appeal, a party must make known to the court any objection to the court's action." *Mendoza v. Block* 27 F.3d 1357, 1360 (9th Cir. 1994). An unequivocal statement of no opposition to a proposed action by the Court precludes consideration of that issue on appeal. *Mendoza, supra*, 27 F.3d at 1360. Because Petitioner failed to file any papers opposing Respondent's motion; failed to submit any evidence, argument or issues of fact; failed to file a separate statement of disputed facts; failed to ask the court to judicially notice his earlier opposition to American States' motion, Petitioner waived his right to seek appellate relief. Petitioner "cannot overturn summary judgment by raising issues of fact on appeal that were not plainly disclosed as a genuine issue in the trial court." *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982.)

"In consenting to an adverse judgment, the appellant waives the right to appeal from the judgment unless the record shows that the appellant clearly intended to preserve the right to appeal." Federal Appellate Practice — Ninth Circuit (1994), § 5.22, 5-35, Lawyer's Cooperative Publishing; *Christian Science v. City and County of San Francisco*, 794 F.2d 1010, 1017 (9th Cir. 1986); *Clapp v. C.I.R.* 875 F.2d 1396, 1398 (9th Cir. 1989). The general rule is that a party consenting to entry of judgment against him or her waives the right to appeal. *Clapp, supra*, 875 F.2d at 1398 [stipulated judgment]; *Christian Science, supra*, 784 F.2d at 1017, amended 792 F.2d 124 (9th Cir. 1986) [order approving settlement].

Petitioner consented to summary judgment in Respondent's favor when he filed a statement of non-opposition, unequivocally

stating that "his lack of opposition to the court's granting of" that motion. (A 1-2.) Accordingly, Petitioner waived the right to appeal and the Court of Appeals properly affirmed summary judgment in Respondent's favor. *United States v. Bechtel Corp.*, 648 F.2d 660, 663 (9th Cir. 1981).

REASONS WHY THE WRIT SHOULD BE DENIED

No valid grounds exist for granting Petitioner's writ of certiorari. The District Court and Court of Appeals' decisions followed accepted and usual course of judicial proceedings. Furthermore, the District Court and the Court of Appeals properly applied California law in deciding that the undisputed evidence that the contamination took place gradually and incrementally over time as a result of normal business operations and thus, fell within the policy's pollution exclusion.

The Court of Appeals' decision is consistent with other relevant Ninth Circuit decisions which hold that when the evidence unequivocally demonstrates that the contamination was caused gradually and incrementally, the pollution is neither sudden nor accidental despite the insured's efforts to break down the pollution-prone activities into temporal components. Additionally, the Court of Appeals' decision is consistent with other Federal Court decisions. Numerous other Federal Courts have held that polluting events that occur in the normal course of business are not sudden and accidental within the meaning of the exception to the policy's pollution exclusion.

The District Court and the Court of Appeals decision are also consistent with public policy. Insureds cannot evade the pollution exclusion by isolating specific instances of environmental harm during the long history of routine chemical spills and later claim coverage for those events which constitute normal business operations of the insured. Otherwise, pollution-prone operations like Sacramento Plating would always be able to defeat the pollution exclusion and manufacture coverage where none exists. Public policy is fostered by the Court of Appeals decision because such a decision discourages insureds from making pollution a part of the normal long-term business operations and practices. The

focus of the concern over environmental pollution by companies such as Sacramento Plating is to eventually stop pollution from becoming a normal and everyday business practice of these operations. Enabling an insured to create coverage from an insurance company for spills which are part of their daily operation, does not achieve this goal.

CONCLUSION

Notwithstanding Petitioner's failure to oppose summary judgment, the District Court and the Court of Appeal thoroughly reviewed, analyzed and evaluated the undisputed facts and applicable law relevant to this case. The District Court's holding is consistent with well-established California and Federal decisions which have already addressed this issue. This is not a case in which warrants review by the Supreme Court.

While acknowledging the important public policy regarding encouraging the clean up of pollution, creating insurance coverage where none exists, drastically impinges on the parties right to contract. Furthermore, public policy is served by the District Court and Court of Appeals' holdings. It is uncontroverted that the policy in this case covers damages caused by "sudden and accidental" events. However, where, as here, the Court has determined that the insured's regular business practices involved long term use and spillage of toxic contamination, no coverage exists. Holding long term polluters accountable for their environmental contamination resulting from their normal business practices, will encourage the cessation of the contamination.

Based on the foregoing, Respondent, Royal Insurance Company, respectfully requests this Court deny Petitioner's Writ of Certiorari.

Dated: May 2, 1997

Respectfully submitted,

ROPERS, MAJESKI, KOHN & BENTLEY

By MARK G. BONINO
Counsel of Record
Attorneys for Respondent
Royal Insurance Company

United States District Court
Eastern District Of California

AMERICAN STATES INSURANCE COMPANY
Plaintiff,

v.

SACRAMENTO PLATING, INC., RICHARD PERRY, ARLENE PERRY, ARTHUR LABOUR, DALE CARTER, RAR MARKETING, INC., ALTA PLATING, AND ALICE KAZANJIAN,
Defendants.

ARTHUR A. LABOUR,
Counter-Claimant,

v.

AMERICAN STATES INSURANCE COMPANY, ROYAL INSURANCE COMPANY,
Counter-Defendants.

CASE NO. CIV-S-93 569 WBS PAN

STATEMENT OF NON-OPPOSITION TO ROYAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

[Eastern District Local Rule 230]

Date: September 26, 1994
Time: 9:00 a.m.
Dept.: Judge Shubb

Without conceding the merits of ROYAL INSURANCE COMPANY's Motion for Summary Judgment, Defendant and Counter-Claimant ARTHUR A. LaBOUR hereby indicates his

lack of opposition to the Court's granting of ROYAL INSURANCE COMPANY's Motion.

HEFNER, STARK & MAROIS

Dated: September 12, 1994

By: DANIEL W. SMITH
STEVEN R. CROOKS
Attorneys for Defendant and Counter-Claimant
Arthur A. Labour

United States District Court
Eastern District of California

AMERICAN STATES INSURANCE COMPANY
Plaintiff,
v.
SACRAMENTO PLATING, INC., RICHARD PERRY, ARLENE PERRY, ARTHUR LABOUR DALE CARTER, RAR MARKETING, INC., ALTA PLATING, AND ALICE KAZANJIAN,
Defendants.

ARTHUR A. LABOUR,
Counter-claimant,
v.
AMERICAN STATES INSURANCE COMPANY, ROYAL INSURANCE COMPANY,
Counter-Defendants.

Case No. CIV-S-93 569 WBS PAN

DECLARATION OF MAILING

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 2710 Gateway Oaks Drive, Suite 300 South, Sacramento, California 95833. I am over the age of 18 years and not a party to the above-entitled action.

On September 12, 1994, I served the following documents:

STATEMENT OF NON-OPPOSITION TO ROYAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT [Eastern District Local Rule 230]

(XX) **By Mail** on the following party(ies) in said action, in accordance with Code of Civil Procedure §1013(a), by

placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. In the ordinary course of business at Hefner, Stark & Marois, mail placed in that designated area is given the correct amount of postage and is deposited that same day in a United States mailbox in the City of Sacramento, California.

( ) **By Personally Delivering** a true copy thereof, in accordance with Code of Civil Procedure §1011, to the person(s) and at the address(es) set forth below.

( ) **By Overnight Delivery** on the following party(ies) in said action, in accordance with Code of Civil Procedure §1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, in a designated area for outgoing overnight mail, addressed as set forth below. In the ordinary course of business at Hefner, Stark & Marois, mail placed in that designated area is picked up that same day for delivery the following business day.

( ) **By Facsimile Transmission,** in accordance with Code of Civil Procedure §1013(e), to the following party(ies) at the facsimile number(s) indicated.

E. John Vodonick, Esq.
DUNBAR & VODONICK
2150 Professional Drive, Suite 110
Roseville, CA 95661

Alice Kazanjian
3958 Bartley Drive
Sacramento, CA 95822

Martha S. Hollingsworth, Esq.
BINGHAM, SUMMERS, WELSH & SPILMAN
2700 Market Tower
10 West Market Street
Indianapolis, Indiana 46204-2982

Richard and Arlene Perry
RAR MARKETING, INC.
321 Waterview Way
Folsom, CA 95630

Edward B. Medlin, Esq.
ROPERS, MAJESKI, KOHN, *et al.*
1001 Marshall Street
Redwood City, CA 94063

Craig E. Farmer, Esq.
FARMER & MURPHY
2701 Prospect Park Drive, Suite 110
Rancho Cordova, CA 95670

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on September 12, 1994.

/s/ KIM M. WILLIAMS

Kim M. Williams

United States District Court
Eastern District of California

AMERICAN STATES INSURANCE CO.,
Plaintiff,
v.
SACRAMENTO PLATING, INC., *et al.*,
Defendants.

NO. CIV. S-93-0569-WBS/PAN
ORDER

Counter-defendant Royal Insurance Company has moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). Counter-claimant Arthur A. LaBour, the only party to this proceeding with claims against Royal, has filed a statement of non-opposition to Royal's motion pursuant to E.D. Rule 230(c).

For the same reasons the court granted summary judgment in favor of plaintiff/counter-defendant American States Insurance Company, *see American States Ins. Co. v. LaBour*, No. CIV S-93-569-WBS/PAN, 1994 WL 469128 (E.D. Cal. August 29, 1994), the court finds that there is no genuine issue of material fact and Royal is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that Royal Insurance Company's motion for summary judgment be, and the same is, hereby GRANTED.

IT IS FURTHER ORDERED that the hearing on Royal's motion summary judgment now set for September 26, 1994 is hereby VACATED.

DATED: September 13, 1994

WILLIAM B. SHUBB
William B. Shubb
United States District Judge

(SPACE BELOW FOR FILING STAMP ONLY)

CRAIG E. FARMER, ESQ.
State Bar No. 61086
FARMER & MURPHY
2701 Prospect Park Drive, Suite 110
Rancho Cordova, CA 95670
Telephone No. (916) 853-2420
Telecopier No. (916) 853-2424

Attorneys for Plaintiff,
AMERICAN STATES INSURANCE COMPANY

United States District Court
Eastern District of California

AMERICAN STATES INSURANCE COMPANY,
Plaintiff,
v.
SACRAMENTO PLATING, INC.,
RICHARD PERRY, ARLENE PERRY,
ARTHUR LABOUR, DALE CARTER,
RAR MARKETING INC., ALTA PLATING,
AND ALICE KAZANJIAN,
Defendants.

---

and Related Cross-Action

CASE NO. CIV-S-93 569 WBS PAN
DECLARATION OF RICHARD J. PERRY

I, RICHARD J. PERRY, declare:

1. I was the general manager of SACRAMENTO PLATING, INC. and an owner of that company from 1963 until October 1988, when I sold the business equipment and operations of SACRAMENTO PLATING, INC. to DALE CARTER. To my knowledge, DALE CARTER did business as "Sacramento Plating" or "Sacramento Plating Company" and continued electroplating operations at 2809, 2817, 2819 and 2821 "S" Street, Sacramento, California (hereinafter "Site") after October 1988.

2. I have personal knowledge of operations at the Site since the early 1950's when the property was being used by Alta Plating. During the 1940's I believe the shop building had been used for tinning. By the time I came to Sacramento in the early 1950's, the Site was being used for an industrial plating works operated by the Kazanjian family under the business name of Alta Plating. I am informed and believe that the Alta Plating operations at the Site became dormant sometime in the early 1960's.

3. In 1957 I began a decorative electroplating facility at 1721 — 16th Street in Sacramento known as A-1 Plating Company. In 1960, the business expanded to 7500 — 14th Avenue, Sacramento, California which became known as "Sacramento Plating." During the years from the early 1950's to 1963, I personally visited the Site at 2809 "S" Street while it was being operated and managed by John Kazanjian under the name Alta Plating. In that time period, I personally observed the industrial electroplating operations five or six times.

4. In or about 1963 my wife, ARLENE PERRY, and I entered into a contract for sale and purchase of the Site with the Kazanjian family. Also in the year 1963, I incorporated my business under the name SACRAMENTO PLATING, INC. During the time period between 1963 and 1965, I moved much of the industrial electroplating equipment I had purchased from the Kazanjians out of the Site and to a location at 18th & "S" Streets where my father and I began operating a separate business which we then called Alta Plating. In approximately 1965, I replaced the removed industrial electroplating equipment at the Site with decorative electroplating equipment moved in from our business at 7500 — 14th Avenue. Thus, for the time period between approximately 1963 and 1988, the property at 2809 which composed the plating and polishing facility was occupied by me and used exclusively in my business known as SACRAMENTO PLATING, INC. The addresses of 2817 and 2819 were a building with two flats which my wife and I rented to tenants. The parcel having the 2821 address contained a small rental office building in the south end of the property. I used the north end of that lot solely for storage of finished bumper inventory.

5. When payments to purchase the property had been completed, my wife and I took title to the Site as owners of the real property in February of 1972 from John and Alice Kazanjian. However, I managed the electroplating facilities at the Site from 1963 until 1988. I was physically at the Site watching and participating in the electroplating processes on a full-time daily basis during those years. My father, until his retirement, managed other business locations of SACRAMENTO PLATING, INC. in those years.

6. The electroplating facility at the Site was a single story building at 2809 "S" Street. The facility had a concrete floor throughout the building. Attached hereto as Exhibit "A" is a diagram from an industrial sewer use permit for which I applied while occupying the Site. The concrete flooring in the electroplating room was designed so that it slanted towards and into a system of concrete drains and a sump which led to a sewer line beneath the ground eventually mixing with other sewer users' wastewater before arriving at the county's sewage treatment plant. By design, any chemical solutions dripped, spilled or otherwise lost in the electroplating process would be deposited on the catwalks (above the concrete flooring) and then onto the concrete flooring of the plating room. From there the liquids would move down the graded concrete surfaces into the concrete drainage system and ultimately to the sanitary sewer.

7. During the electroplating process, various automobile parts to be plated (primarily steel bumpers) were cleaned, rinsed and plated with use of chemical solutions in the plating room. The parts would be immersed in chemical baths with platers (i.e., employees of SACRAMENTO PLATING, INC.) moving the parts by hand from bath to bath through the process. In doing so, the chemicals in liquid form would normally splash and/or drip off the parts, onto the catwalk surfaces and from there to the flooring as each part was being transferred from one chemical bath to the next. Chemical solutions would also drip down the sides of and off the tanks causing a residue on the sides of the tanks.

8. Attached hereto as Exhibit "B" is a true and correct copy of a diagram I created in the 1970's during the time I was working at

the Site. The diagram accurately depicts how parts were dipped and moved in the plating process conducted at the Site during the time I was the Site's manager. A part would be immersed and moved through the fresh water tanks and chemical baths as shown in Steps 1 through 7. It would then be polished in another room before returning to the plating room at which point it would again go through Steps 1 to 7 followed by dipping through additional baths shown in Steps 8 through 13 on the diagram. This was the usual plating procedure for 95% of the parts processed. The other 5% would involve processing materials other than steel; those would go through the first three steps and then through several of the steps on the west side of the plating room floor.

9. In regard to Exhibit "B," chemicals that were spilled, splashed or dripped off the parts were also washed down the slanted flooring into the drainage system and from there into the sewer on a daily basis while the facility was in operation. Tanks shown on the diagram as "fresh water . . ." were designed to be constantly and continuously discharged onto the floor, into the floor drain system and then to the sewer. Additionally, the plating room equipment and flooring was washed down as a part of periodic maintenance and upkeep during my management and the washed down liquid also would have collected on the slanted flooring and moved into the drainage system and eventually into the sewer pipe shown on the diagram which is Exhibit "A."

10. Before 1981, I constructed a cinder block "berm" at the north and south ends of the plating room facility in order to contain any sewage backup or to otherwise protect both the office (at the south end of the structure) and areas of the premises outside the facility (beyond the north end of the structure) from any overflow in the event of a release from any of the tank equipment. Thus, the berm and slanted flooring were designed to act as a holding pond in the event any tanks should release their contents within the plating room's floor space and until such liquids found their way into the drain system and sewer pipe.

11. There were no explosions, fires, earthquakes or other natural disasters which affected any of the equipment at the Site during the years I managed the facility to my knowledge. How-

ever, the following events of which I am aware took place in reference to loss of chemical bath liquids, and the indicated dates are the most specific I can identify since there are no records to my knowledge which document any of them:

Spring 1981 — Drainage of Acid Copper Tank Contents

The acid copper liquid in the 400-gallon tank (see Exhibit "B") is composed of copper sulfate and sulfuric acid, a corrosive solution. This tank was lined with a plastic, rubber-like material which was vulcanized to the tank interior. In Spring 1981, the contents of the tank drained onto the concrete floor and down into the floor drainage system as a result of the acid copper liquid's corrosion of the metal bottom of the tank. I believe this resulted from a hole in or failure of the tank's liner. None of the chemicals from that incident would have gone anywhere other than the building's floor and down into the drain system to my knowledge. I replaced the corroded 400-gallon acid copper tank with two 400-gallon tanks that were thereafter used for the same purpose as the original replaced tank. During my management of SACRAMENTO PLATING, INC's operations at the Site, I experienced no breaks, leaks or any problems with the two 400-gallon tanks.

June 1984 Nickel Plating Tank Overflow

In June 1984 someone (presumably one of the employees) placed a hose in the southernmost of the two 800-gallon nickel plating tanks located within the west side of the building as shown on Exhibit "B". This was done to replenish the tank's solution with water; however, the water was left running too long resulting in an overflow of the chemical bath or solution down onto the slanted concrete flooring and from there into the floor drain system. To my knowledge the overflow did not go anywhere else.

May 1985 — Drainage of Nickel Plating Tank Contents

In May 1985 the northernmost of the nickel plating tanks emptied part of its contents due to a hole in or failure of the lining of that tank. It was a loss of about 400 gallons of the 800-gallon contents which took place over a period of approximately 12-

hours. In that instance the tank released its contents through the southern side wall of the tank at a point near the tank's west end as shown in Exhibit "B." The contents of the tank drained onto the slanted flooring and from there into the floor drain system. The chemical materials would not have gone anywhere other than down the drain to the sewer.

12. The tank content losses described above were not reported to any governmental agencies or to any insurance companies or insurance brokers or agents. These events were not considered insurable by me at the time they occurred. They arose from general business hazards which I expected to occur in SACRAMENTO PLATING, INC.'s operations at the Site, even though I did not want them to happen since replacement of any chemical bath solution is a substantial business expense. These incidents involving loss of tank contents as well as the daily splashing and dripping of chemicals from the baths during the plating of bumpers and other processed parts were a normal part of the business at the Site throughout the time it was occupied by me and operated as SACRAMENTO PLATING, INC.

13. Generally, tanks which contain chemical baths were not drained; additional chemicals in solution were simply added to the tanks from time to time. The only time a chemical bath was ever emptied in whole or in part, other than the three incidents described above, was when that tank was being moved or replaced. The tank to be moved would be drained by pumping its chemical solution contents to a holding tank on a temporary basis while the emptied tank was being moved. Once the emptied tank was moved, the solutions were emptied back into it from the holding tank. This moving process took place on less than five occasions to my recollection from 1963 through October 1988. There were no solution losses or problems during these exchanges of liquids from one tank to another.

14. During each of those occasions when loss of chemical bath solutions resulted from the failure of tank liners or the overflow tank contents, I observed the chemical materials on the concrete flooring which led to the drain. No chemicals drained as a result of these events to anywhere other than the plating room's slanted flooring and from there to the drainage system, eventually into the

sanitary sewer. To my knowledge no chemicals in solution or otherwise were discharged or released outside of or off the plating room's flooring area during the time SACRAMENTO PLATING, INC. was operating under my management.

15. During my management at the Site, the business of SACRAMENTO PLATING, INC. did not use lead in any of the chemical solutions which were part of the decorative electroplating process conducted in the plating room. The following chemicals were used: Muriatic acid, sulfuric acid, copper sulfate, nickel sulfate, nickel chloride, boric acid, chromic acid, cyanide, zinc cyanide, copper cyanide, sodium cyanide, free sodium cyanide, rochelle salts, sodium carbonate, total sodium cyanide, chloride, chromium oxide, sulfate, fluoride, soda ash, sodium bicarbonate, ammonia, sodium hydroxide and hydrochloric acid.

16. In my capacity as manager and owner of SACRAMENTO PLATING, INC. in the years from 1963 through 1988, no one ever complained to me or notified SACRAMENTO PLATING, INC. employees to my knowledge that there were any chemicals or byproducts of the electroplating process of my company found on any surrounding parcels of property or endangering anyone.

I declare under penalty of perjury that the foregoing is true and correct, that I have personal knowledge of said facts and that, if called as a witness, I can testify competently to the truth thereof.

Executed this 18th day of July, 1994 at Sacramento, California.

Richard J. Perry
individually and on behalf
of RAR MARKETING, INC.